In The

Supreme Court of the United States

October Term, 1995

THE HONORABLE WILLIAM STRATE, Associate Tribal Judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation; THE TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION; LYNDON BENEDICT FREDERICKS; KENNETH LEE FREDERICKS; PAUL JONAS FREDERICKS; HANS CHRISTIAN FREDERICKS; JEB PIUS FREDERICKS; GISELA FREDERICKS,

Petitioners,

v.

A-1 CONTRACTORS; LYLE STOCKERT,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

MELODY L. MCCOY
Counsel of Record
DONALD R. WHARTON
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel for Petitioners The Honorable William Strate, Associate Tribal Judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, and The Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation

THOMAS A. DICKSON
DICKSON LAW OFFICE
P.O. Box 1896
Bismarck, North Dakota 58502
(701) 222-4400

Counsel for Petitioners Lyndon Benedict Fredericks, Kenneth Lee Fredericks, Paul Jonas Fredericks, Hans Christian Fredericks, Jeb Pius Fredericks, and Gisela Fredericks

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

131 PP

QUESTIONS PRESENTED

1. Did the Court of Appeals err in applying the rule of *Montana v. United States*, 450 U.S. 544 (1981), that the inherent sovereign civil jurisdiction of Indian tribes over the activities of non-Indians has been generally and implicitly divested, to a question of tribal court jurisdiction over an action between two non-Indians arising on a state highway crossing Indian reservation land held in trust by the federal government for the Tribe, rather than applying the rule of *Iowa Mutual Ins. Co. v LaPlante*, 480 U.S. 9 (1987), that Tribes have retained their civil jurisdiction over non-Indian activities on Indian land unless that jurisdiction has been expressly limited by treaty provision or federal statute?

2. Assuming *arguendo* that the *Montana* rule applies, does the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation nevertheless have civil jurisdiction over a personal injury claim brought by a non-Indian resident of the Reservation with strong ties to the Tribe, against a non-Indian contractor that has a subcontract with a tribal corporation to perform work on the Reservation, to recover for damages suffered in an automobile accident on a state highway on a federal right-of-way crossing tribal trust land on an Indian reservation?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioners, the Honorable William Strate, Associate Judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation and the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, respectfully pray that a Writ of *Certiorari* issue to review the *en banc* judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on February 16, 1996.

OPINIONS BELOW

The *en banc* judgment and opinion and dissenting opinion of the Court of Appeals for the Eighth Circuit, entered February 16, 1996, are reported at 76 F.3d 930, available on Westlaw, and reprinted in the Appendix (hereinafter "App.") hereto at pages App. 1 through App. 48. The order granting rehearing *en banc* entered on January 9, 1995 is reprinted at App. 49. The opinion and dissenting opinion of the three judge panel of the Court of Appeals, entered November 29, 1994 and vacated by the granting of rehearing *en banc*, are reprinted at App. 50 through App. 72. The District Court's memorandum and order, entered September 16, 1992, are unpublished and reprinted at App. 73 through App. 86. The opinion of the Northern Plains Intertribal Court of Appeals, dated January 8, 1992 is unpublished and reprinted at App. 88 through App. 100. The memorandum opinion and order of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, filed on September 4,

1991, is unpublished and reprinted at App. 101 through App. 109.

JURISDICTION

Rehearing *en banc* by the Court of Appeals for the Eighth Circuit was granted by order of January 9, 1995. The *en banc* judgment and opinion and dissenting opinion of the Court of Appeals were entered on February 16, 1996. This petition for writ of *certiorari* is filed on May 16, 1996, within 90 days of February 16, 1996.

This Court has jurisdiction to review the final *en banc* judgment of the Court of Appeals for the Eighth Circuit under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are set out verbatim as follows:

A. 25 U.S.C. § 323. Rights-of-way for all purposes across any Indian lands:

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians o. Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in

New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

B. 18 U.S.C. § 1151. Indian country defined:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian Country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

STATEMENT OF THE CASE

A. Introduction

On November 9, 1990, there was a traffic accident on North Dakota Highway 8 within the exterior boundaries of the Indian Reservation of the Three Affiliated Tribes of Fort Berthold (hereinafter "the Tribe").[1] Highway 8 is

[1] The Three Affiliated Tribes (Mandan, Hidatsa, and Arikara) are a federally-recognized Indian tribe which exercises its sovereignty under a federally-approved constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479. The Tribe is located on the Fort Berthold

situated on a federal right-of-way on land held by the federal government in trust for the Tribe.[2] The accident involved two non-Indians: Gisela Fredericks, a Reservation resident for over 40 years and the wife of tribal member Kenneth Fredericks (now deceased); and, Lyle Stockert, an employee and part owner of A-1 Contractors, a non-Indian subcontracting company located off the Reservation.

At the time of the accident, Lyle Stockert was driving a company gravel truck. A-1 Contractors was working on the Reservation under a construction subcontract entered into on the Reservation with LCM Corporation. LCM Corporation is wholly owned by the Tribe. Under the subcontract, A-1 Contractors did excavating, berming, and recompacting in connection with the construction of a tribal community building. All of A-1 Contractors' work under the subcontract was performed within the boundaries of the Reservation.

Indian Reservation in what is today west central North Dakota pursuant to the Treaty of Fort Laramie of Sept. 17, 1851, 11 Stat. 749, with the United States. When created in 1851, the Reservation was about 13.5 million acres. Successive federal acts have reduced it to its present size of about 1 million acres. About 415,000 of those acres are held by the federal government in trust for the Tribe or tribal members. About 3,000 acres are privately owned by Indians in fee simple status. About 339,000 acres are owned in fee by non-Indians. Over 150,000 acres are other federal lands, and another 9,000 acres are owned by the state or the six counties which lie in whole or in part within the Reservation.

[2] The right-of-way was granted on May 8, 1970 pursuant to the Rights-of-way Across Indian Lands Act of 1948, 25 U.S.C. § 323.

B. Proceedings in the Tribal Courts and in the Federal District Court

Mrs. Fredericks and her five adult children, who are enrolled members of the Tribe[3] (hereinafter collectively referred to as "the Fredericks"), sued Lyle Stockert and A-1 Contractors (hereinafter collectively referred to as "A-1")[4] in Tribal Court[5] for damages for injuries allegedly sustained in the accident as a result of their negligence. Mrs. Fredericks sought $1,000,000 for her personal injuries and medical expenses. Her children sought $1,000,000 for loss of consortium.

---

[3] The Tribe has about 9,100 members. About 3,300 of them live within the exterior boundaries of the Reservation. About 2,400 non-members, including non-Indians, also live within the Reservation's exterior boundaries.

[4] Also named, but later dismissed, was Continental Western Insurance Company, A-1's insurer on the subcontract activities. A punitive damages claim was dismissed when the insurance company was dismissed.

[5] The Tribe has operated a court system as the judicial branch of its government since 1969. The court system receives federal funding (about $300,000 per year) under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n. The Tribe contributes an additional $[illegible],000 per year. The court system operates under a written law and order code. At present there are four law trained judges and one magistrate who has had training but is not a law graduate. In 1995 the court system handled 1,901 criminal cases and 397 civil cases, forty-one percent (41%) of which involved non-Indians. Appeals from the Tribal Court may be taken to the Northern Plains Intertribal Court of Appeals, which also receives funding under the Indian Self-Determination and Education Assistance Act.

A-1 moved to dismiss the action for lack of jurisdiction under federal law. The Tribal Court held that it had jurisdiction under federal law over Mrs. Fredericks' action.[6] (App. 106). The Northern Plains Intertribal Court of Appeals affirmed and remanded the case to the Tribal Court for further proceedings. (App. 97). No further proceedings have occurred against A-1 in this case in Tribal Court since the remand.

Under 28 U.S.C. § 1331, A-1 sought declaratory and injunctive relief from tribal jurisdiction in the federal district court for North Dakota. In addition to the Fredericks, the Tribal Court and the Tribal Court Judge (hereinafter collectively referred to as "the Tribal Defendants") were named as defendants. The Tribal Defendants waived their immunity and consented to suit for the limited purpose of defending the federal law claims against tribal jurisdiction in this case.

On cross-motions for summary judgment, the Honorable Patrick A. Conmy denied A-1's motion and granted the Fredericks' and Tribal Defendants' motions. (App. 82).[7]

---

[6] The Tribal Court expressly declined to reach or express any opinion as to its jurisdiction over the consortium claims by Mrs. Fredericks' children. (App. 107). No other court has reached this issue in this litigation.

[7] The district court noted that tribal court jurisdiction was not exclusive, implying concurrent jurisdiction with the state courts. (App. 82). While never an issue in this case, the Tribe has never claimed that it has exclusive jurisdiction over the action.

C. Proceedings in the United States Court of Appeals for the Eighth Circuit

1. The Three Judge Panel

A-1 appealed to the Court of Appeals for the Eighth Circuit.[8] A three judge panel ruled 2-1 in favor of tribal court jurisdiction over Mrs. Fredericks' action. The majority opinion was authored by Judge McMillian and joined by Judge Floyd R. Gibson. Judge Hansen dissented.

2. The *En Banc* Court

The *en banc* Court of Appeals ruled 8-4 against tribal court subject matter jurisdiction under federal law over Mrs. Fredericks' action. Judge Hansen authored the majority opinion which was joined by Chief Judge Richard S. Arnold, and Judges Fagg, Bowman, Wollman, Magill, Loken, and Morris Shepard Arnold. Judges McMillian, Floyd R. Gibson, Beam, and Murphy dissented. Judge Beam wrote a concurring and dissenting opinion and Judges Gibson and McMillian wrote dissenting opinions. All four dissenting Judges joined each of the dissenting opinions.

---

[8] The issue of personal jurisdiction of the Tribal Court over A-1 was raised in and reached by the Tribal Court (App. 106), the Tribal Court of Appeals (App. 88), and the federal district court. (App. 82). All of these courts found that the Tribal Court has personal jurisdiction over A-1. Before the Court of Appeals, A-1 raised only the issue of subject matter, not personal, jurisdiction. (App. 2).

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS IMPORTANT AND UNRESOLVED QUESTIONS OF FEDERAL LAW CONCERNING THE EXISTENCE OF TRIBAL COURT JURISDICTION OVER A CIVIL ACTION BETWEEN TWO NON-INDIANS THAT AROSE ON INDIAN LAND WITHIN AN INDIAN RESERVATION

Two lines of this Court's cases set forth different rules for determining whether an Indian tribe has civil jurisdiction over the activities of non-Indians within the boundaries of an Indian reservation. The *Iowa Mutual*[9] rule presuming tribal jurisdiction derives from this Court's earliest federal Indian law cases, *e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832), and finds its most recent expression as follows:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. . . . Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 149, n.14.

Iowa Mutual, 480 U.S. at 18 (some citations omitted).

---

[9] Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) (hereinafter "the *Iowa Mutual* rule").

The *Montana*[10] rule presuming divestment of tribal jurisdiction stems from *Montana* and its progeny, *Brendale*[11] and *Bourland*.[12] It states that tribes have been generally and implicitly divested of their inherent sovereign jurisdiction over the activities of non-Indians. This presumption against tribal jurisdiction can be defeated by either of two exceptions set out in *Montana* in the so-called "tribal interest test," discussed *infra* pp. 15-20.

Significantly, the *Montana* cases all involved challenges to tribal authority over the activities of non-Indians on formerly tribal land that has been alienated pursuant to congressional legislation which broadly opened such land for non-Indian ownership or occupation. But lower courts have questioned whether the *Montana* rule also applies to cases that arise on Indian land[13]

---

[10] Montana v. United States, 450 U.S. 544 (1981), (hereinafter "the *Montana* rule").

[11] Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989).

[12] South Dakota v. Bourland, 508 U.S. 679 (1993).

[13] In this Petition, the term "Indian land" is used to mean land in which the Tribe or tribal members have an interest. It does not include land owned in fee by non-Indians or land alienated from Indian title by Congress. As noted above, the state highway in this case runs through the Reservation pursuant to a federal right-of-way granted under 25 U.S.C. § 323. The highway here is clearly Indian land under North Dakota law, Davis v. Director, North Dakota Dep't of Transp., 467 N.W.2d 420, 422 (N.D. 1991) (hereinafter "Davis"), and under federal law. *See* 18 U.S.C. § 1151, *as construed in* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 n.5 (1987).

within a reservation, and if so, how such an application can be reconciled with the *Iowa Mutual* rule.

This case exemplifies the lower courts' confusion. The federal district court applied the *Iowa Mutual* rule. (App. 82-83). The *en banc* majority reversed and held that this case is governed by the *Montana* rule. (App. 24). Three of the dissenting appeals court judges believe that the *Montana* rule is limited to instances of non-Indian activity on non-Indian fee lands. *E.g.*,

> I believe that the analysis and underlying rationale set forth in *Montana* have no relevance outside the narrow context of a tribe's ability to regulate fee lands owned by non-Indians. As such, I would limit the rule of that case to its facts and rely instead on the broad scope of inherent tribal sovereignty outlined in cases such as *Iowa Mutual*. . . .

(App. 32) (Floyd R. Gibson, J., dissenting) (citation omitted); and McMillian, J., in dissent, "I would apply *Montana*, and its exceptions, only to fee lands owned by non-tribal members." (App. 39). They recognize that if *Montana* is not so limited, it is inconsistent, if not unreconcilable, with the *Iowa Mutual* rule. Even the *en banc* majority concedes that "some of the language from *Iowa Mutual* . . . can be viewed in isolation to create tension with *Montana*." (App. 18).

This case presents the opportunity for this Court to clarify the application of its federal Indian law precedents. It is, moreover, an opportunity to settle the merits of an issue which impacts the rights of tribes nationwide and innumerable parties who reside on, do business on, or visit Indian reservations. It is a matter of broad public

importance. Indeed, as the *en banc* majority aptly admits, this case presents an issue which "is largely unresolved and [which] has generated a great deal of interest and commentary." (App. 8).

2. THE COURT OF APPEALS' *EN BANC* MAJORITY OPINION CONFLICTS WITH THIS COURT'S DECISIONS INTERPRETING THE EXISTENCE OF INHERENT TRIBAL SOVEREIGNTY OVER THE ACTIONS OF NON-INDIANS ON INDIAN LAND WITHIN TRIBAL RESERVATIONS

The *en banc* majority's error in analyzing tribal jurisdiction in this case stems largely from a misunderstanding of *Montana*, *Brendale*, and *Bourland*. Those cases contained three essential elements. First, they all involved land taken from a tribe by Congress for non-Indian ownership or occupation.[14] Second, the Court in those cases found that the conduct of the non-Indians on the fee or taken land posed no threat to the welfare of a tribe. Third, the cases all involved a conflict between a tribe and a state or federal agency over competing regulatory jurisdiction.

None of these elements is present here. First, the accident occurred on Indian land within the continuing

---

[14] *Montana*, of course, also involved Indian land upon which this Court upheld tribal regulation of the activities of non-Indians. "The Court of Appeals held that the Tribe may prohibit nonmembers from hunting and fishing on land belonging to the Tribe or held by the United States in trust for the Tribe . . . and with this holding we can readily agree." 450 U.S. at 557.

jurisdiction of the Tribe. *See Davis, supra,* at n.13. Second, as pointed out by Judge Floyd R. Gibson, tribes have a significant interest in dealing "with non-tribe members who happen to wreak havoc on tribal lands." (App. 32). Third, this case presents no conflict whatever between competing claims of a tribe and a state over jurisdiction. As noted earlier, the Tribe here claims only concurrent jurisdiction with the state over Mrs. Fredericks' action.[15]

By applying the *Montana* rule to this case, the *en banc* majority has effected an unprecedented extension of that rule to Indian land. To compound its error, the majority announces a new rule regarding tribal jurisdiction over non-Indian activities on a reservation by reading the *Iowa Mutual* rule

> together with *Montana* to establish one comprehensive and integrated rule: a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law.

(App. 18). This rule cannot be reconciled with the *Iowa Mutual* rule. Indeed, the Court of Appeals' new rule converts the *Iowa Mutual* rule into a subtest of the *Montana* rule – a rule incompatible with these cases as well as with other opinions of this Court.

---

[15] The courts of the State of North Dakota accord comity to the enforcement of tribal court judgments. Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc. 462 N.W.2d 164, 167-168 (N.D. 1990).

For example, *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (*National Farmers*). In *National Farmers*, a tribal member was allegedly injured on a reservation by a non-Indian. The non-Indian, faced with a lawsuit in tribal court, asked this Court to extend the general and implicit divestment rule regarding tribal criminal jurisdiction over non-Indians, announced in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), to the civil arena. This Court declined to do so and held that tribal adjudicatory jurisdiction over reservation-based civil actions involving non-Indians has not been generally and implicitly divested. *National Farmers*, 471 U.S. at 855-856. Relying on *Montana*, the majority below here ignores *National Farmers* and makes the precise argument rejected there into a rule of law. "*Montana* specifically extended the general principles underlying *Oliphant* to civil jurisdiction. . . . " (App. 13).

The majority opinion below is a gross distortion of both the *Montana* rule and the *Iowa Mutual* rule. Only this Court can now ensure that this critical jurisdictional issue is properly understood and applied.

3. THE COURT OF APPEALS' *EN BANC* MAJORITY OPINION CONFLICTS WITH DECISIONS OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT ON THE APPLICATION OF THE PRECEDENTS OF THIS COURT REGARDING TRIBAL COURT JURISDICTION OVER CIVIL ACTIONS AGAINST NON-INDIANS ARISING ON INDIAN LAND WITHIN AN INDIAN RESERVATION

In *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994); *cert. denied* 115 S.Ct.485, (1995) (*Hinshaw*), a case very similar

to this one, the Court of Appeals for the Ninth Circuit upheld tribal court jurisdiction under federal law. In *Hinshaw*, two non-Indians were involved in a traffic accident on a federal highway running through an Indian reservation. The accident resulted in the death of one of the non-Indians. Although both non-Indians were reservation residents, neither were tribal members. The mother of the deceased, who is a tribal member, brought various tort claims against the surviving non-Indian in tribal court.[16]

The *Hinshaw* court's analysis of tribal jurisdiction is relevant here. The Ninth Circuit applied the *Iowa Mutual* rule, not the *Montana* rule. The Ninth Circuit found that under the *Iowa Mutual* rule and in the absence of an expressly limiting federal law, the tribal court retained jurisdiction to hear the case. *Hinshaw*, 42 F.3d at 1181; *see also U.S. ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901 (9th Cir. 1994), where the Ninth Circuit observed in a contract action by a non-Indian against a tribal member that, "[s]trictly speaking, the *Montana* exceptions are relevant only after the court concludes that there has been a general divestiture of tribal authority over non-Indians by alienation of the land." 34 F.3d at 906.

The *en banc* majority's analysis and result in this case is clearly contrary to *Hinshaw*. The majority admits as

---

[16] While the plaintiff in *Hinshaw* was a tribal member, her cause of action was derivative, brought in a representative capacity on behalf of the nonmember son. *Hinshaw*, 42 F.3d at 1180-1181. If the tribal court would not have had jurisdiction to hear the deceased son's case, it could not have heard the mother's derivative action.

much, stating that "[t]o the extent that *Hinshaw* supports the appellees' arguments that tribal courts have jurisdiction over a tort claim arising between two non-Indians on a highway running through an Indian reservation, we respectfully decline to follow it." (App. 19). This Court should now accept this opportunity to resolve the conflict between the Eighth and Ninth Circuits on this important issue.

4. ASSUMING *ARGUENDO* THAT THE *MONTANA* "TRIBAL INTEREST TEST" APPLIES TO DETERMINE TRIBAL JURISDICTION IN THIS CASE, THE *EN BANC* MAJORITY MISCONSTRUED THAT TEST

Montana does not hold that tribal jurisdiction over the activities of non-Indians has been completely divested. The *Montana* tribal interest test sets forth two instances where tribes have such jurisdiction:

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-566 (citations omitted). All four dissenting judges would uphold tribal jurisdiction in this case under both the consensual relationship and the direct effect exceptions.

A. The *en banc* majority erred in its construction of the "consensual relationship" exception

It is undisputed that the subcontract between A-1 and the Tribe's corporation is a "consensual relationship." The *en banc* majority nevertheless believes that this subcontract is insufficient to sustain tribal jurisdiction over Mrs. Fredericks' action against A-1. The majority reasons that this is because "[t]he dispute in this case is . . . not a dispute arising under the terms of, out of, or within the ambit of the 'consensual agreement,' *i.e.*, the subcontract between the tribes and A-1. Gisela Fredericks was not a party to the subcontract, and the tribes were strangers to the accident." (App. 21).

The dissenting judges correctly recognize that *Montana* does not so limit the meaning of "consensual relationship." Rather, *Montana* holds simply that a tribe may regulate the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements. *Montana*, 450 U.S. at 565. Hence, the Tribe here has jurisdiction over civil actions arising on the Reservation and involving A-1 whether those actions are over the terms of the subcontract or not. Simply put, but for the subcontract, Mrs. Fredericks' injuries might not have occurred. As Judge Floyd R. Gibson states, "[This case] arose as a direct result of A-1's commercial consensual

contacts with the tribe. . . . I . . . fail to see any other plausible explanation as to why a gravel truck owned by A-1 . . . was on tribal land at the time of the collision." (App. 33).

Other courts agree with the dissent. For example, in *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991), a non-Indian business located on non-Indian fee land within an Indian reservation objected to tribal regulation of its employment practices. In arguing against the existence of a "consensual relationship," the business asserted that its connections with the Tribe, although substantial, were not sufficiently related to employment to justify the regulation at issue. The Court of Appeals found that no such direct correlation was required. Based on various agreements and dealings between the business and the Tribe, the court held that the business had "subjected itself to the civil jurisdiction of the Tribes." 905 F.2d at 1315, *citing Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982) (upholding a tribe's jurisdiction to impose health regulations on a non-Indian grocery store located on non-Indian fee lands within a reservation).

This Court needs to clarify that the majority below erred in limiting tribal jurisdiction under *Montana* to disputes over the subject matter or terms of a consensual relationship between a non-Indian and an Indian.

B. The *en banc* majority erred in its construction of the direct effect exception

All of the dissenting judges would find a direct effect on the Tribe's political integrity and welfare in this case. That effect stems primarily from the Tribe's sovereign interest in providing a forum to resolve civil disputes arising on its Reservation. Judge Beam writes that "[a] legitimate judicial system arise as a result of sovereignty;" (App. 25), and "[o]ne of the strongest interests that the tribe advances in this case is its interest in providing a forum for this plaintiff." (App. 28). Judge Floyd R. Gibson states:

> [T]he power to adjudicate everyday disputes occurring within a nation's own territory is among the most basic and indispensable manifestations of sovereign power. As Chief Justice Marshall observed:
>
> > No government ought to be so defective in its organization, as not to contain within itself, the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect, that a government should repose on its own courts, rather than on others.
>
> *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 387-88 (1821).

(App. 31-32). Judge McMillian agrees:

> The tribe also has an interest in affording those who have been injured on the reservation with a judicial forum. . . . [D]isregarding the jurisdiction of tribal courts, which play a vital role in tribal self-government, undermines their authority over reservation affairs and to that extent imperils the political integrity of the tribe.

McMillian (App. 48).

The Tribe also has an interest in ensuring safety on its highways on its Reservation. As Judge McMillian observes, "the allegedly tortious conduct of A-1 and Stockert occurred on a state highway right-of-way on the reservation. This conduct by non-Indians within the reservation threatened the tribe's interest in the safe operation of motor vehicles on the roads and highways on the reservation." (App. 47-48). This interest is heightened where, as here, the injuries are allegedly caused by entities the Tribe has employed to work on public projects on the Reservation, and the injuries are to residents of the Reservation who are closely related to tribal members. As Judge Floyd R. Gibson notes:

> [T]he majority opinion also unfairly discounts the effect of A-1's conduct on the health and welfare of the tribe. While the immediate victim of the collision . . . is not a member of the tribe, she is nonetheless a longtime resident of the reservation whose husband and adult children are enrolled tribal members. To claim that A-1's conduct on tribal land had no effect on the health or welfare of the tribe is simply unrealistic and not in accordance with the facts.

(App. 34).

Finally, the dissents take issue with the majority's view that under *Montana*, a tribe or tribal member must be a party to a tribal court action for there to be tribal court jurisdiction. Judge Beam believes that *Montana* makes clear that non-Indians alone can significantly impact tribal interests:

> [*Montana*] fully recognized that non-Indians and nonmembers can affect the political integrity, economic security, health and welfare of a tribe under the proper circumstances. The *Montana* Court's establishment of two tribal jurisdiction "exceptions" and its refusal to wholly extend its holding in *Oliphant* to civil jurisdiction demonstrates the Court's cognizance of the influence of non-Indians and tribal real estate on tribal self-government.

(App. 27-28) (footnote omitted).

The opportunity to provide a forum for the civil resolution of claimed injuries arising on its Reservation is all the Tribe here seeks. This Court should now correct the majority below's failure to acknowledge that this issue in this case indeed directly affects the Tribe.

CONCLUSION

For the reasons stated above, this Court should grant *certiorari* to review the *en banc* judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

MELODY L. MCCOY
Counsel of Record
DONALD R. WHARTON
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

THOMAS A. DICKSON
DICKSON LAW OFFICE
P.O. Box 1896
Bismarck, North Dakota 58502
(701) 222-4400

Counsel for Petitioners

May 16, 1996

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3359

A-1 Contractors; Lyle Stockert, Appellants, v. Honorable William Strate, Associates Tribal Judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation; Three Affiliated Tribes of the Fort Berthold Indian Reservation, The Tribal Court; Lyndon Benedict Fredericks; Kenneth Lee Fredericks; Paul Jonas Fredericks; Hans Christian Fredericks; Jeb Pius Fredericks; Gisela Fredericks, Appellees.	•	Appeal from the United States District Court for the District of North Dakota.

Submitted: May 23, 1995

Filed: February 16, 1996

Before RICHARD S. ARNOLD, Chief Judge, FLOYD R. GIBSON, McMILLIAN, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges, en banc.

HANSEN, Circuit Judge.

In this case, we are asked to decide whether an American Indian Tribal Court has subject matter jurisdiction over a tort case which arose out of an automobile accident which occurred between two non-Indian parties on an Indian reservation. A divided panel of this court previously concluded that the Indian tribe retained the inherent sovereign power to allow the tribal court to exercise subject matter jurisdiction over the dispute. After granting the suggestion of A-1 Contractors and Lyle Stockert to rehear this case en banc, we vacated the panel opinion. We now hold that the tribal court does not have subject matter jurisdiction over the dispute.

I.

On November 9, 1990, on a state highway on the Fort Berthold Indian Reservation in west-central North Dakota, a gravel truck owned by A-1 Contractors and driven by Lyle Stockert (an A-1 employee) and a small car driven by Gisela Fredericks collided. Mrs. Fredericks suffered serious injuries and was hospitalized for 24 days. A-1 is a non-tribal company located in Dickinson, North Dakota. Stockert is not a member of the tribe and resides in Dickinson, North Dakota. Mrs. Fredericks is not a

member of the tribe; however, she resides on the reservation, she was married to a tribal member (now deceased), and her adult children are enrolled members of the tribe.

At the time of the accident, A-1 was working on the reservation under a subcontract agreement with LCM Corporation, a corporation wholly owned by the tribe. Under the subcontract, A-1 performed excavating, berming, and recompacting work in connection with the construction of a tribal community building. A-1 performed all of the work under the subcontract within the boundaries of the reservation. The record is not clear whether Stockert was engaged in work under the contract at the time of the accident.[1]

In May 1991, Mrs. Fredericks sued A-1, Stockert, and Continental Western Insurance Company (A-1's insurer), in the Tribal Court for the Three Affiliated Tribes[2] of the Fort Berthold Indian Reservation. Mrs. Fredericks' adult children also filed loss of consortium claims as part of the suit. Mrs. Fredericks and her adult children sought damages in excess of $13 million for personal injury, loss of consortium, and medical expenses.

---

[1] There is no proof (as opposed to allegations) that we can find in the record to support the district court's finding of fact that A-1 was in performance of the contract at the time of the accident. The district court made its fact-findings based on the pleadings in this case, not upon the evidence.

[2] The Three Affiliated Tribes – Mandan, Hidatsa, and Arikara – are federally recognized Indian tribes which exercise their sovereignty under a federally approved constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479.

A-1, Stockert, and Continental Western made a special appearance in tribal court and moved to dismiss the Fredericksses' suit, contending that the tribal court lacked personal and subject matter jurisdiction. The tribal court denied the motion and found that it had personal and subject matter jurisdiction over the suit brought by Gisela Fredericks. *Fredericks v. Continental Western Ins. Co.*, No. 5-91-A04-150, slip op at 1.24(d) (Fort Berthold Tribal Ct. Sept. 4, 1991). Specifically, the tribal court found that it had personal jurisdiction over the parties based on Chapter 1, section 3 of the Tribal Code because Mrs. Fredericks is a resident of the reservation and because A-1 had "entered and transacted business within the territorial boundaries of the Reservation." *Id.* at 1.24(c). The tribal court also concluded that it had subject matter jurisdiction over the action because its inherent tribal sovereignty had not been limited by treaty or federal statute. *See id.* at 1.24(d). Given the tribal court's conclusion that it had jurisdiction over the claims of Gisela Fredericks, the tribal court did not reach the question of its jurisdiction over the consortium claims brought by her children, who were tribal members.

A-1, Stockert, and Continental Western appealed to the Northern Plains Intertribal Court of Appeals. The Intertribal Court of Appeals affirmed the tribal court and remanded the case to the tribal court for further proceedings. *Fredericks v. Continental Western Ins. Co.*, Northern Plains Intertribal Ct. App. 1 (Jan. 8, 1992). The Intertribal Court of Appeals took a broad view of the tribe's civil authority over the non-Indians involved in this dispute:

> Like any sovereign, Three Affiliated Tribes has [sic] an interest in providing a forum for peacefully resolving disputes that arise in their geographic jurisdiction and protecting the rights of those who are injured within such jurisdiction.

Slip op. at 7. Continental Western was dismissed from the case without prejudice pursuant to an agreement of the parties.

Before proceedings resumed in the tribal trial court, A-1 and Stockert filed this case in the United States District Court for the District of North Dakota against Mrs. Fredericks and her children (hereinafter "the Fredericksses"), the Honorable William Strate, Associate Tribal Judge for the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, and the tribal court itself. A-1 and Stockert sought injunctive and declaratory relief. They asked the district court to declare that the tribal court had no jurisdiction over this matter, to enjoin the Fredericksses from proceeding against them in the tribal court, and to enjoin the tribal judge and the tribal court (hereinafter the "tribal defendants") from asserting jurisdiction over them.

The tribal defendants initially raised the affirmative defense of sovereign immunity, but subsequently consented to the suit for the limited purpose of defending the federal law claims for injunctive relief. Both sides filed motions for summary judgment on the issue of tribal court jurisdiction. The district court denied the summary judgment motion of A-1 and Stockert, and it granted the summary judgment motions of the Fredericksses and the tribal defendants. *A-1 Contractors v. Strate*, Civil No. A1-92-94 (D.N.D. Sept. 17, 1992). The district court

decided that the only factual dispute was whether Mrs. Fredericks resided on or off the reservation, which was irrelevant to the issue of tribal court jurisdiction. *Id.* at 4-5. The district court then decided that the tribal court had both personal and subject matter jurisdiction, and concluded that Indian tribes have retained inherent sovereignty to exercise jurisdiction over civil causes of action between non-Indians that arise on the reservation unless specifically limited by treaty or federal statute. *Id.* at 9-10. The district court found that there was no treaty or statute that limited the tribe's jurisdiction in this case. *Id.* at 10. A-1 and Stockert appealed on the issue of subject matter jurisdiction over the claims of Mrs. Fredericks.[3]

A panel of this court affirmed the district court in a two-to-one decision. *A-1 Contractors v. Strate*, No. 92-3359, 1994 WL 666051 (8th Cir. Nov. 29, 1994). A-1 and Stockert requested review of the panel's decision en banc. We granted their request, vacated the panel opinion, and set this case for rehearing en banc.

II.

We review de novo the district court's decision both granting and denying summary judgment. *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992). We agree with the district court that this case presents no relevant

[3] The consortium claims of Mrs. Fredericks' adult children are not a part of this appeal because neither the tribal courts nor the federal district court addressed the tribal courts' jurisdiction over those claims.

factual disputes for our review. The only question presented, whether the tribal court has jurisdiction over this dispute, is a question of law. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313-14 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991).

The specific question presented for our resolution is whether the tribal court has civil jurisdiction over this dispute which arose between two non-Indian parties on the Fort Berthold Reservation. A-1 and Stockert argue that under Supreme Court case law, the tribe does not have the inherent sovereign authority to exercise civil jurisdiction over non-Indians unless the dispute implicates an important tribal interest. *See, e.g., Montana v. United States*, 450 U.S. 544 (1981); *South Dakota v. Bourland*, 113 S. Ct. 2309, 2320 (1993); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 426-27 (1989) (plurality). A-1 and Stockert argue that because this case involves no such tribal interest, the district court erred in holding that the tribal court had subject matter jurisdiction over this dispute. The Frederickses and the tribal defendants (collectively "the appellees") argue that a different line of Supreme Court authority governs this issue. The appellees argue that language from this line of cases indicates that the district court correctly concluded that tribal courts have inherent civil jurisdictional authority over all disputes arising on the reservation, regardless of whether the parties involved are tribal members. *See, e.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (198[illegible]); *National Farmers Union Ins. Cos v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *Williams v. Lee*, 358 U.S. 317 (1959). The appellees contend that the district court correctly found

that the tribe had full geographical/territorial jurisdiction over this dispute. The issue presented for our review is largely unresolved and has generated a great deal of interest and commentary. *See, e.g.*, Allison S. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. Pitt. L. Rev. 1 (1993) (detailing and criticizing the Supreme Court's increasing emphasis on membership-based sovereignty).

In our view, the standards articulated in *Montana v. United States*, 450 U.S. 544 (1981), and subsequent cases applying those standards, control the resolution of this dispute. In *Montana*, the Supreme Court specifically addressed the reach of tribal civil jurisdiction over non-Indian parties and found that:

> the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Id. at 564 (citations omitted). The Court then announced the general principle that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565.[4]

---

[4] Stated another way: "A tribe's inherent sovereignty . . . is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves the tribe's 'external relations.' " *Brendale*, 492 U.S. at 425-26 (plurality) (citing *United States v. Wheeler*, 435 U.S. 313, 326 (1978)). The tribe's external relations are generally those involving nonmembers of the tribe. *See id.*

Indian tribes, however, do "retain inherent sovereign authority to exercise *some* forms of civil jurisdiction over non-Indians on their reservations." *Id.* (emphasis added). This jurisdiction arises: (1) when nonmembers "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or (2) when a nonmember's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66 (citations omitted). These two situations are the "two exceptions" to *Montana's* general rule that an Indian tribe does not have inherent sovereign powers over the activities of nonmembers. *Bourland*, 113 S. Ct. at 2320. In our view, the tribal court in this case would not have subject matter jurisdiction under *Montana* unless the appellees can establish the existence of a tribal interest under either of the two exceptions.

The Supreme Court has reiterated or reaffirmed the *Montana* analysis of civil tribal jurisdiction over non-Indians a number of times. *Bourland*, 113 S. Ct. at 2319 (reasserting the centrality of the observation in *Montana* that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal tribal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation"); *County of Yakima v. Confederated Tribes*

and Bands of Yakima Indian Nation, 502 U.S. 251, 267 (1992) (citing *Montana* in referring to the "long line of cases exploring the very narrow powers reserved to tribes over the conduct of non-Indians within their reservations"); *Duro v. Reina*, 495 U.S. 676, 687-88 (1990) (criminal jurisdiction case reciting *Montana's* observation that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" and that civil tribal jurisdiction over non-Indians on the reservation typically involves situations arising from property ownership within the reservation or the "consensual relationships" outlined in *Montana*), *overruled by statute on other grounds*, 25 U.S.C. § 1301(2) & (3); *Brendale*, 492 U.S. at 426-27 (plurality) (following *Montana* principles and concluding there was no tribal interest which allowed the tribe to exercise authority over nonmembers on fee lands within the reservation). Perhaps the Court's most emphatic reiteration of these standards is its recent statement that "after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation.' " *Bourland*, 113 S. Ct. at 2320 n.15.

The appellees argue that instead of applying the *Montana* analysis, we should resolve this case under the Supreme Court's decisions in *Iowa Mutual*, *National Farmers Union*, *Williams v. Lee*, and *Merrion*. In our view, none of those cases supports the appellees' contentions that the tribal court has the broad civil subject matter jurisdiction the tribal courts and the district court found in this case. In *Iowa Mutual*, the Court held only that exhaustion of tribal remedies is required before a federal district court can decide the issue of federal court jurisdiction. 480 U.S. at 18-19; *see also Brendale*, 492 U.S. at 427

n.10 (the plurality specifically observed that *Iowa Mutual* only established an exhaustion rule and did not decide whether the tribe had jurisdiction over the nonmembers involved). In reaching its conclusion on the exhaustion requirement, the Court offered the following observation upon which the appellees rely heavily:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981) [other citations omitted]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.

Iowa Mutual, 480 U.S. at 18. The appellees argue that this language indicates that Indian tribes retain unrestricted territorial civil jurisdiction unless that jurisdiction has been affirmatively limited by treaty or federal statute. The appellees contend that like a state, the tribe retains full sovereignty over all matters arising on the reservation unless and until that jurisdiction is divested by federal law. The appellees further argue that consistent with *Iowa Mutual*, the tribal court may exercise subject matter jurisdiction in this case because it happened on the reservation and there has been no affirmative divestment of the tribe's authority.

In our view, the appellees' reading of this isolated language from *Iowa Mutual* is unnecessarily broad and conflicts with the principles of *Montana*. This language from *Iowa Mutual* can and should be read more narrowly and in harmony with the principles set forth in *Montana*, which the Court cites in making those observations.

When the Court observes in *Iowa Mutual* that "[t]ribal authority over the *activities* of non-Indians on reservation lands is an important part of tribal sovereignty," 480 U.S. at 18, the Court cites *Montana* and thus is referring to the types of activities, like consensual contractual relationships (the first *Montana* exception), that give rise to tribal authority over non-Indians under *Montana*. Likewise, when the Court goes on to say "[c]ivil jurisdiction over *such activities* presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute," *id.* (emphasis added), the Court again is referring to a tribe's civil jurisdiction over tribal-based activities that exists under *Montana*. We recently interpreted the *Iowa Mutual* case in just such a fashion, stating: "Civil jurisdiction over *tribal-related* activities on reservations presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or by federal statute." *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1299 (8th Cir. 1994) (emphasis added) (citing *Iowa Mutual*, 480 U.S. at 18). Hence, *Iowa Mutual* should not be read to expand the category of activities which *Montana* described as giving rise to tribal jurisdiction over non-Indians or nonmembers. Instead, we read it within the parameters of *Montana*.

National Farmers Union, like *Iowa Mutual*, was an exhaustion case which did not decide whether tribes had jurisdiction over nonmembers. *Brendale*, 492 U.S. at 427 n.10. Nonetheless, the appellees contend that we should read *National Farmers Union* as a limitation on the reach of *Montana* because *National Farmers Union* limited the reach of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), a criminal tribal jurisdiction case upon which *Montana* relied. In *Oliphant*, the Court had concluded that tribal courts have no criminal jurisdiction over non-Indians because the tribe did not retain the inherent authority to exercise that type of jurisdiction. 435 U.S. at 208-10. The Court in *National Farmers Union* stated that "the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require." 471 U.S. at 855. The appellees argue that in *National Farmers Union* the Court refused to extend *Oliphant's* limitation of inherent sovereign authority to civil cases.

The appellees fail to recognize the fact that *Montana* specifically extended the general principles underlying *Oliphant* to civil jurisdiction. *Montana*, 450 U.S. at 565 ("Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe") (footnote omitted). *Montana* did not extend the full *Oliphant* rationale to the civil jurisdictional question – which would have completely prohibited civil jurisdiction over nonmembers. Instead, the Court found that the tribe retained *some* civil jurisdiction over nonmembers, which the Court went on to describe in the *Montana* exceptions. 450 U.S. at 565-66. Thus, when *National Farmers Union* states that civil tribal jurisdiction over nonmembers is not foreclosed by *Oliphant*, that observation is perfectly consistent with *Montana*, which provides for broader tribal jurisdiction over non-Indians than does *Oliphant*. Under *Montana*, the tribe has the ability to exercise civil jurisdiction over non-

Indians when tribal interests (as defined in the *Montana* exceptions) are involved.

We also read the other cases the appellees rely upon within the limits of *Montana*. In *Williams*, the Court found that the tribal courts had jurisdiction over a suit by a non-Indian store owner on the reservation against two members of the tribe for breach of contract based on a transaction that occurred on the reservation. 358 U.S. at 218, 223. This factual situation fits squarely under the "consensual agreement" test for jurisdiction in *Montana* (the first *Montana* exception). In fact, *Montana* specifically cited *Williams* in creating the two exceptions that allow for civil jurisdiction over non-Indians. 450 U.S. at 544-45.

Similarly, the appellees read too much into language from *Merrion*, where the Court stated in a footnote: "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." 455 U.S. at 149 n.14. The Court made the observation in isolation in a case dealing with the tribe's authority to impose a severance tax on non-Indians on the reservation. The Court found this taxation power was derived either from the tribe's inherent power of self-government or the power to exclude, *id.* at 149, both of which are consistent with the inherent powers the tribe retains over nonmembers described in *Montana*. Both *Merrion* and *Iowa Mutual* say essentially the same thing: the inherent attributes of sovereignty that an Indian tribe retains, which under *Montana* are very limited when dealing with non-Indians, remain intact unless affirmatively limited by the federal government.

The appellees argue that *Montana* and *Brendale* apply only to a tribe's ability to exercise authority over non-Indians' activities on non-Indian fee lands – i.e., plots of land owned by non-Indians in fee simple that happen to be located within the exterior boundaries of the reservation. In our view, the appellees place an artificial limitation on those cases. While *Montana* and *Brendale* address questions of tribal authority over non-Indians on non-Indian owned fee lands, neither case limits its discussion or rationale to jurisdictional issues arising on fee lands. To the contrary, the *Montana* Court found, without any qualification whatsoever, that *tribal power* may not reach beyond what is necessary to protect tribal self-government or to control internal relations absent express congressional delegation. 450 U.S. at 564. *Montana* also specifically addressed the "forms of civil jurisdiction over non-Indians *on their reservations*" and provided the two limited situations in which that jurisdiction may arise. *Id.* at 565 (emphasis added). Thus, *Montana* explicitly addressed the authority of tribes to exercise civil jurisdiction on the reservation, as well as on non-Indian fee lands. The *Brendale* plurality noted that *Montana* involved regulation of fee lands, but it did not specifically limit the *Montana* rationale to fee land disputes. *See Brendale*, 492 U.S. at 426-27. Since *Brendale*, the Supreme Court likewise has not seen fit to limit either *Montana* or *Brendale* in the fashion the appellees have suggested. Instead, the Court has discussed these cases and their observations about tribal jurisdiction in broad and unqualified language. *See Bourland*, 113 S. Ct. at 2319; *County of Yakima*, 502 U.S. at 267; *Duro*, 495 U.S. at 687.

Moreover, a number of cases analyzing civil jurisdictional issues in non-fee land disputes have relied upon or cited *Montana*. *See Stock West Corp. v. Taylor*, 964 F.2d 912, 918-19 (9th Cir. 1992) (en banc) (quoting *Montana* test in non-fee land jurisdictional dispute); *FMC*, 905 F.2d at 1314 (citing *Montana* in non-fee land case as "the leading case on tribal civil jurisdiction over non-Indians"); *see also Tamiami Partners Ltd. v. Miccosukee Tribe of Indians of Florida*, 999 F.2d 503, 508 n.11 (11th Cir. 1993) (citing *Montana* in recognizing that tribal courts have power to exercise civil jurisdiction in conflicts affecting the *interests of Indians* on Indian lands). Thus, we conclude that any attempt to limit the rationale of *Montana* and *Brendale* to fee land jurisdictional issues is both uncompelling and unsupported by the language of those two cases.

The appellees next argue that we should read the *Montana* line of cases as addressing tribal regulatory power over non-Indians and the line of cases represented by *Iowa Mutual* as addressing tribal adjudicatory power over non-Indians. They contend that *Iowa Mutual* and related cases would control in this case, which is a dispute about tribal adjudicatory power. The appellees assert that drawing such a distinction would be the best way to resolve what they see as the apparent contradiction between the language from those differing lines of cases.

Again, we must disagree. While the distinction the appellees propose appears in some commentaries, *see, e.g.*, Dussias, 55 U. Pitt. L. Rev. at 43-78, the distinction does not appear explicitly, or even implicitly, anywhere in the case law. *Montana* and the cases following *Montana*

have dealt with questions of civil tribal regulatory jurisdiction, but those cases have never suggested that their reasoning is limited solely to regulatory matters. Quite the contrary, as we have noted above, those cases have spoken about civil jurisdiction in broad and unqualified terms without any limitation of the discussion to particular aspects of civil jurisdiction. Likewise, *Iowa Mutual* and the other cases the appellees rely on have never suggested such a distinction. In fact, in *Iowa Mutual*, the Court cites *Montana* without any indication that *Montana* should be limited to regulatory jurisdiction. *Iowa Mutual*, 480 U.S. at 18.

Moreover, any attempt to create or apply a distinction between regulatory jurisdiction and adjudicatory jurisdiction in this case would be illusory. If the tribal court tried this suit, it essentially would be acting in both an adjudicatory capacity and a regulatory capacity. At oral argument, all of the parties agreed that if the tribal court tried this case, it would have the power to decide what substantive law applies. Essentially, the tribal court would define the legal relationship and the respective duties of the parties on reservation roads and highways. Thus, while *adjudicating* the dispute, the tribal court also would be *regulating* the legal conduct of drivers on the roads and highways that traverse the reservation. Accordingly, we see no basis in this case for applying the regulatory-adjudicatory distinction the appellees have proposed.

Furthermore, even if we applied a regulatory-adjudicatory distinction, it would not change our conclusion. None of the cases, including those that the appellees argue are "adjudicatory jurisdiction" cases, have ever

addressed the issue presented here – a tribal court's civil jurisdiction over an accident involving non-Indian parties. As we have demonstrated above, all of the appellees' proposed "adjudicatory" cases are consistent with the *Montana* case. Even if we were to treat *Montana* as a "regulatory" authority case, we see no reason not to apply its principles to this open question of inherent authority to exercise civil adjudicatory jurisdiction over this dispute. Thus, we see no valid basis for distinguishing or limiting *Montana*, as the appellees suggest.

Arguably, some of the language from *Iowa Mutual*, *Williams*, and *Merrion* can be viewed in isolation to create tension with *Montana*. A careful reading of the particular language of those cases, however, indicates that they can and should be read together with *Montana* to establish one comprehensive and integrated rule: a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law. This rule is supported by the above authority and by the leading treatise on American Indian law, which specifically states: "Tribal courts probably lack jurisdiction over civil cases involving only non-Indians in most situations, since it would be difficult to establish any direct impact on Indians or their property." *Felix S. Cohen's Handbook of Federal Indian Law*, 342-43 (1982 ed.). This well-accepted rule controls this case.

Finally, the appellees urge us to follow a recent decision in a case factually very similar to this case, where the

Ninth Circuit held that the tribal court had jurisdiction over the lawsuit. *See Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994). In *Hinshaw*, Christian Mahler died from injuries he received when a car driven by Lynette Hinshaw collided with the motorcycle Mahler was riding on a U.S. highway within the boundaries of the Flathead Indian Reservation. Both Mahler and Hinshaw were residents of the reservation, but they were not members of the tribe. *Id.* at 1180. Mahler's mother (an enrolled member of the tribe) and Mahler's father (a nonmember) brought wrongful death and survivorship actions in the tribal court. Hinshaw challenged the tribal court's personal and subject matter jurisdiction in federal district court. The Ninth Circuit affirmed the district court's conclusion that the tribal court had jurisdiction over those claims. *Id.* at 1180-81. To the extent that Hinshaw supports the appellees' arguments that tribal courts have jurisdiction over a tort claim arising between two non-Indians on a highway running through an Indian reservation, we respectfully decline to follow it. Such a broad interpretation of civil tribal jurisdiction is, we believe, inconsistent with *Montana*.

The authority is quite clear that the kind of sovereignty the American Indian tribes retain is a *limited* sovereignty, and thus the exercise of authority over nonmembers of the tribe "is necessarily inconsistent with a tribe's dependent status." *Brendale*, 492 U.S. at 427 (citing *United States v. Wheeler*, 435 U.S. 313, 326 (1978)). Stated another way, "the inherent sovereign powers do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565, *quoted in Duro v. Reina*, 495 U.S. at 687. As such, we cannot endorse the appellees' concept

of plenary tribal territorial (or geographical) civil jurisdiction. Such a concept presents an overly broad interpretation of the tribe's sovereignty which is inconsistent with the tribe's dependent status and is contrary to Montana. Thus, for the tribe to exercise civil jurisdiction over nonmembers, the *Montana* exceptions must be satisfied because the "inherent attributes of sovereignty" do not extend to nonmembers.

While the tribe's inherent authority to assert civil jurisdiction over a nonmember depends on the existence of a tribal interest as defined in *Montana*, that does not mean geography plays no role in the sovereignty and jurisdictional inquiry. "The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980). In *Montana*, the Court accounted for this geographical component of the jurisdictional analysis when it stated that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations, even on non-Indian fee lands.*" 450 U.S. at 565 (emphasis added). *Montana* implicitly recognizes that without the geographic connection to Indian country, the tribes would have no plausible grounds for asserting jurisdiction over the non-Indian parties. Thus, properly understood, the geographical component of the jurisdictional analysis is important but not dispositive. *See generally Bracker*, 448 U.S. at 151 (geographical component of tribal sovereignty is important – though not dispositive factor for courts to weigh in determining whether a state's authority to tax non-Indians for activities on reservation has been preempted).

III.

Applying *Montana* to this case, there must be a tribal interest at issue (as defined in the *Montana* exceptions) before the tribal court can exercise jurisdiction over the non-Indian parties. We conclude that no such tribal interest exists in this case. This dispute arose between two non-Indians involved in an ordinary run-of-the-mill automobile accident that occurred on a North Dakota state highway traversing the reservation. Those facts, which stand alone in this case, make this dispute distinctively non-tribal in nature.

The appellees argue that the "consensual relationship" test (the first *Montana* exception) is satisfied because A-1 voluntarily entered into a subcontract with the tribe and Lyle Stockert was an A-1 employee who was allegedly on the reservation pursuant to that subcontract when he was involved in the accident with Gisela Fredericks. In our view, that reasoning is flawed. The dispute in this case is a simple personal injury tort claim arising from an automobile accident, not a dispute arising under the terms of, out of, or within the ambit of the "consensual agreement," i.e., the subcontract between the tribes and A-1. Gisela Fredericks was not a party to the subcontract, and the tribes were strangers to the accident.[5]

---

[5] A-1 and Stockert have noted that under the terms of the subcontract involved in this case, all disputes arising out of the subcontract would be determined under Utah law and would be heard in the Utah courts. The appellees have not argued to the contrary. However, we will not give this fact any controlling weight because the subcontract is not part of this record.

The appellees also argue that the second Montana exception is satisfied because the dispute arose on the reservation, and therefore, the conduct in dispute here necessarily affects the tribe's political integrity, economic security, or health or welfare. The appellees contend that the dispute affects the tribe's political integrity because it deals with the tribe's ability to function as a fully sovereign government. We disagree. In our view, this case has nothing to do with the Indian tribe's ability to govern its own affairs under tribal laws and customs. It deals only with the conduct of non-Indians and the tribe's asserted ability to exercise plenary judicial authority over a decidedly non-tribal matter. The only governmental interest the tribe alleges is the right to act as a full sovereign to exercise full sovereign authority over events that happen within its geographical boundaries. As noted above, tribes are limited sovereigns and do not possess full sovereign powers. Thus, this desire to assert and protect excessively claimed sovereignty is not a satisfactory tribal interest within the meaning of the second *Montana* exception.

The appellees also argue that even though Mrs. Fredericks is a non-Indian and nonmember of the tribe, she is a long-time resident of the reservation and hence is an imbedded member of the community with a recognizable social and economic value to the tribal community. Thus, they argue that it is critical to provide her a tribal forum for her disputes. The simple fact that Mrs. Fredericks is a resident of the reservation, however, does not satisfy the second *Montana* exception. It is not essential to the tribe's political integrity, economic security, or health or welfare to provide her, a non-Indian and nonmember, with a

judicial forum for resolution of her disputes. A forum is available to Mrs. Fredericks in the North Dakota state courts, and there is no indication that she would be prevented from asserting her claims, in full, in that forum.[6]

Likewise, the fact that Mrs. Fredericks wants to bring her suit in the tribal courts does not control. *Montana* very clearly states that the conduct giving rise to the case must threaten or have a "*direct effect* on the political integrity, economic security, or health or welfare *of the tribe*," not the nonmember, before the tribe can assert civil jurisdiction over nonmembers. 450 U.S. at 466 (emphasis added). Nor is it persuasive to us that Mrs. Fredericks may be as close to being a member of the tribe as she could be without actually being a member. *Montana* is very clear that tribal membership is of critical importance. Mrs. Fredericks is neither an Indian nor a member of the tribe. The fact that Mrs. Fredericks has not been admitted to membership in the tribe places her outside

---

[6] There has been some discussion of the effect of 28 U.S.C. § 1360 on jurisdiction of the North Dakota state courts. That section, by its very terms, applies only to the state court's jurisdiction over actions to which Indians are parties. *See also* 25 U.S.C. § 1322 (similar jurisdictional provision of Indian Civil Rights Act). Because we have found that this case does not involve any Indian parties, those sections simply do not apply to this case. We note that even if applicable, those sections would tend to indicate that the North Dakota state courts have jurisdiction over this case. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986) (North Dakota's attempt to disclaim unconditional state court jurisdiction over civil claims arising in Indian country held invalid).

the reach of the tribe's inherent authority, absent some separate showing of a direct effect on the tribe. In this case, the appellees have completely failed to show that the tribe's ability to govern or protect its own members would be directly damaged if the tribe cannot assert jurisdiction over this lawsuit. Thus, the second exception to *Montana* does not apply.

IV.

Simply stated, this case is not about a consensual relationship with a tribe or the tribe's ability to govern itself; it is all about the tribe's claimed power to govern non-Indians and nonmembers of the tribe just because they enter the tribe's territory. By remaining within the principled approach of *Montana*, the tribe retains the ability to govern itself because the tribal court will have jurisdiction whenever a "tribal interest" in a dispute is established. Under *Iowa Mutual*, where such a tribal interest exists, the jurisdiction is broad and requires an affirmative change in federal law to limit it in any way. Because we have concluded that no tribal interest as defined in *Montana* exists in this case, we conclude that the tribe does not retain the inherent sovereign power to exercise subject matter jurisdiction over this dispute through its tribal court. Accordingly, we reverse the judgment of the district court.

BEAM, Circuit Judge, with whom FLOYD R. GIBSON, McMILLIAN, and MURPHY, Circuit Judges, join, concurring and dissenting.

I concur in the court's "comprehensive and integrated" rule that "a valid tribal interest must be at issue

before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law." *Supra* at 15-16. I dissent, however, from the court's application of the rule in this case and from the implication that a tribal court has no jurisdiction in a civil case unless the dispute involves an Indian or a member of the tribe.

The concept of "tribal interest" as advanced by the court appears to be a free-floating theory wholly detached from geographic reality except in a most attenuated way. I dissent from this ideation of tribal jurisdiction because it is contrary to *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and other earlier cases, to say nothing of *Montana v. United States*, 450 U.S. 544 (1981), the case most heavily relied upon by the court.

A legitimate judicial system arises as an attribute of sovereignty. Indeed, "the existence and extent of a tribal court's jurisdiction . . . require[s] a careful examination of tribal sovereignty." *National Farmers Union*, 471 U.S. at 855. Accordingly, any determination of tribal court jurisdiction requires examination of the parts and pieces of tribal sovereignty and how they fit within the jurisdictional equation.

Historically, the connection of Indians to the land has shaped the course of Indian law. In the landmark case of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832), Indian

nations were recognized as "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." In *Williams v. Lee*, 358 U.S. 217 (1959), the Court recognized the importance of Indian land when it decided the question of jurisdiction over a case brought in state court by a non-Indian merchant against Indian customers. Holding that the case should have been brought in tribal court, the Court stated "[i]t is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 223.

Even in more recent cases the Court has recognized the significance of geography to tribal sovereignty. In *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975), the Court noted that its cases had consistently recognized that the Indian tribes retain "attributes of sovereignty over both their members and *their territory*." (Emphasis added.) *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), explores a tribe's historic power to exclude others from tribal lands.

Brendale supports a rule which would allow a court to consider Indian territory in determining the tribe's interest in a given case. The plurality in *Brendale* suggests a case-by-case approach to deciding whether *Montana*'s second exception confers tribal jurisdiction. The precise wording of the second exception, the plurality writes, indicates that "a tribe's authority need not extend to all conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribes', but instead depends on the circumstances." *Brendale*, 492 U.S. at 429. Thus, *Brendale* suggests

that the meaning of *Montana*'s second exception is not static but depends on various factors.

All of these cases further suggest that geography plays a vital role in a tribe's political integrity, economic security, health and welfare, and therefore must be strongly considered in any application of *Montana*'s second exception, whether or not Indian or tribal members are parties to the dispute.

Even *Montana* lends support to the geographic component of tribal court jurisdiction. The Supreme Court stated:

> [t]o be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations*, even on non-Indian fee lands.

450 U.S. at 565 (emphasis added). The Court in *Montana* cited its earlier holding in *United States v. Wheeler*, 435 U.S. 313 (1978) and noted that Indian Tribes are " 'unique aggregations possessing attributes of sovereignty over both their members and *their territory*.' " 450 U.S. at 563 (emphasis added).

In finding no jurisdiction here, the court describes tribal membership as "critical" to the Court's holding in *Montana*. *Supra* at 20. Such a characterization oversimplifies *Montana*, overstates the role tribal membership plays in a determination of tribal court jurisdiction and understates the role of territorial integrity. *Montana* was the product of several factors, including the nature of the regulation in question and the application of that regulation to fee land. It fully recognized that non-Indians and nonmembers of a tribe can affect the political integrity,

economic security, health and welfare of a tribe under the proper circumstances. The *Montana* Court's establishment of two tribal jurisdiction "exceptions" and its refusal to wholly extend its holding in *Oliphant*[1] to civil jurisdiction demonstrates the Court's cognizance of the influence of non-Indians and tribal real estate on tribal self-government.

One of the strongest interests that the tribe advances in this case is its interest in providing a forum for this plaintiff. And, the question of North Dakota state court jurisdiction is not as clear-cut as the court suggests. In fact, such jurisdiction is doubtful.

Two important points are relevant to this issue. First, Public Law 280, 28 U.S.C. § 1360, does not, for reasons other than those advanced by the court, have any bearing on this issue. In footnote 6, *supra* at 19, the court explains that 28 U.S.C. § 1360 applies only to actions to which Indians are parties. The original Public Law 280, however, applied to *all* "civil causes of action." *See* Act of Aug. 15, 1953, Pub. L. 280, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360); *see also* Felix S. Cohen, *Handbook of Federal Indian Law* 362-63 (1982 ed.). Under the original Act, assumption of jurisdiction was mandatory for some states and optional for others, including North Dakota. It was not until 1968, when amendments to Public Law 280 were enacted, that state assumption of jurisdiction was limited to actions to which Indians were parties, subject to tribal

[1] In *Oliphant*, the Court held that tribal courts could not validly assert criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

consent. North Dakota had chosen to assume civil jurisdiction before the amendments were adopted,[2] but had voluntarily conditioned its jurisdiction upon consent of the tribes. N.D. Cent. Code § 27-19-01 (1991). The tribes of the Fort Berthold reservation did not consent. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g I*, 467 U.S. 138 (1984). Thus, North Dakota has no jurisdiction over the Fort Berthold reservation under 28 U.S.C. § 1360.

My second point is more relevant to the question of the authority of a state court to assume jurisdiction over a cause of action arising on an Indian reservation. Even absent jurisdiction conferred by federal statute, state courts may exercise jurisdiction over some civil causes of action arising on reservation lands. The scope of state court jurisdiction is limited by the *Williams v. Lee* "infringement" test: "whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. State court jurisdiction cannot be disclaimed, at least where there is no other forum in which to bring an action. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g II*, 476 U.S. 877 (1986).

Thus, the question of whether a North Dakota state court can provide a forum for Mrs. Fredericks depends upon whether state jurisdiction in this instance would

[2] As Felix Cohen explains, although the amendments altered any prospective assumption of Public Law 280 jurisdiction, it preserved all jurisdiction previously acquired under the Act. Cohen, 363 n.126.

infringe upon the tribe's right to self government. Commentators seem to agree that state courts have subject matter jurisdiction over suits by non-Indians against non-Indians, even when the claim arises in Indian Country, so long as Indian interests are not affected. *See, e.g.*, Cohen, 352 ("The scope of preemption of state laws in Indian country generally does not extend to matters having no direct effect on Indians, tribes, their property, or federal activities. In these situations state courts have their normal jurisdiction over non-Indians and their property, both in criminal and civil cases."); Sandra Hansen, *Survey of Civil Jurisdiction in Indian Country 1990*, 16 Am. Indian L. Rev. 319, 346 (1991).

The Three Affiliated Tribes have, however, adopted a tribal code which outlines civil court jurisdiction within the exterior boundaries of the reservation and which, in the absence of federal law to the contrary, imposes tribal law and custom, not North Dakota statute or common law, as controlling precedent for torts occurring within the reservation. *See* Tribal Code of the Three Affiliated Tribes of the Fort Berthold Reservation Ch. 1, § 2 (1980); *see also* Cohen 334-35.

Thus, in this case, state court jurisdiction would infringe upon the tribe's right of self government including the right to provide a forum, indeed the only forum, available to this resident of the reservation. The accident occurred on Indian land over which the tribe asserts territorial sovereignty and involved a non-Indian truck driver brought onto the reservation by a commercial contract between the tribe and his employer. Even though Mrs. Fredericks was a non-Indian, she had long resided on the reservation with a tribal member spouse (now

deceased) and is the mother of adult children who are enrolled members of the tribe. Had either accident participant been an Indian, the situs of the accident on the reservation would have clearly dictated tribal court jurisdiction as established in *Brendale, Iowa Mutual, National Farmers Union* and *Montana*. The tribal court has jurisdiction over Mrs. Fredericks' claim. I dissent from the court's ruling to the contrary.

FLOYD R. GIBSON, Circuit Judge, with whom McMILLIAN, BEAM, and MURPHY, Circuit Judges, join, dissenting.

I agree with Judge McMillian's and Judge Beam's dissents. I write separately to express my dismay at this Court's unduly narrow view of "limited sovereignty." The type of "limited sovereignty" allotted by this Court to the tribe is, in fact, no real sovereignty at all.

Whether framed in terms of inherent tribal sovereignty under *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987), or tribal interests under *Montana v. United States*, 450 U.S. 544, 565-66 (1981), the power to adjudicate everyday disputes occurring within a nation's own territory is among the most basic and indispensable manifestations of sovereign power. As Chief Justice Marshall observed:

> No government ought to be so defective in its organization, as not to contain within itself, the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect, that a government should repose on its own courts, rather than on others.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387-88 (1821). This case does not present an extraordinary occurrence. As the majority opinion notes, this case involves "an ordinary run-of-the-mill automobile accident." *Ante* at 18. The majority opinion today denies the tribe the ability to adjudicate the type of basic disputes that occur daily within Indian territory unless these disputes involve tribal members. Such a restriction interferes with the tribe's ability to manage its affairs by compromising its ability to deal with non-tribe members who happen to wreak havoc on tribal land.

I believe that the analysis and underlying rationale set forth in *Montana* have no relevance outside the narrow context of a tribe's ability to regulate fee lands owned by non-Indians. 450 U.S. at 557-67. As such, I would limit the rule of that case to its facts and rely instead on the broad scope of inherent tribal sovereignty outlined in cases such as *Iowa Mutual*, 480 U.S. at 18.[1]

Even if I were convinced that the reach of *Montana* is as broad as the majority of this Court believes it to be, I believe that this case implicates tribal interests and, as

---

[1] Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence is that the sovereign power remains intact.

Citations and quotation omitted.

such, falls squarely under either of the two *Montana* exceptions. I believe that this case meets the "consensual relationship" test under the first *Montana* exception because it arose as a direct result of A-1's consensual commercial contacts with the tribe. See 450 U.S. at 565-66. Had A-1 not subcontracted with LCM Corporation, a corporation wholly owned by the tribe, to perform construction work on a tribal community building within the boundaries of the reservation, the accident would never have occurred. The majority claims that there is "no proof (as opposed to allegations) . . . to support the district court's finding of fact that A-1 was in performance of the contract at the time of the accident." *Ante* at 3, note 1. I, however, fail to see any other plausible explanation as to why a gravel truck owned by A-1, a non-Indian-owned company, was on tribal land at the time of the collision. Because I believe that the accident clearly arose as the result of A-1's consensual relationship with the tribe and its members, I believe that the tribe retains the inherent sovereign power to exercise civil jurisdiction over A-1 under the first *Montana* exception.

I also believe that the tribe retains the inherent power to exercise civil authority over A-1 under the second *Montana* exception because A-1's conduct on tribal land "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. The majority dismisses the tribal interests at stake here as a "desire to assert and protect excessively claimed sovereignty." *Ante* at 19. As previously observed, however, the ability of a sovereign, even a limited sovereign, to adjudicate the everyday affairs and accidents occurring within its borders and provide a

forum for its citizens is one of the most basic and indispensable aspects of sovereignty. Aside from the threat to the tribe's political integrity, the majority opinion also unfairly discounts the effect of A-1's conduct on the health and welfare of the tribe. *Ante* at 18-20. While the immediate victim of the collision, Gisela Fredericks, is not a member of the tribe, she is nonetheless a longtime resident of the reservation whose husband and adult children are enrolled tribal members. To claim that A-1's conduct on tribal land had no effect on the health or welfare of the tribe is simply unrealistic and not in accordance with the facts.

For the aforementioned reasons, I would affirm the order of the district court.

McMILLIAN, Circuit Judge, with whom FLOYD R. GIBSON, BEAM, and MURPHY, Circuit Judges, join, dissenting.

I join in Judge Beam's opinion concurring in part and dissenting in part, particularly the emphasis on the importance of geography or territory in analyzing issues of tribal sovereignty. I write separately to set forth the reasons why I would hold that the federal district court, and the tribal courts, correctly decided that the tribal court has subject matter jurisdiction over this reservation-based tort action between non-tribal members.

There are no disputed issues of fact relevant to the jurisdiction issue. None of the parties are tribal members. Gisela Fredericks is a resident of the reservation; the truck driver, Lyle Stockert, and his employer, A-1 Contractors, are not residents, but A-1 was performing work on the reservation under a subcontract agreement with

LCM Corp., a corporation wholly owned by the tribe, in connection with the construction of a tribal community building. Because the accident occurred within the exterior boundaries of the reservation, on a state highway right-of-way,[1] the cause of action arose on the reservation. The tribal code establishes personal and subject matter jurisdiction and applies tribal law and custom.

The legal issue presented, tribal court civil jurisdiction, is a question of federal law subject to de novo review. *See, e.g., FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313-14 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991). The jurisdiction issue is properly presented for determination on the merits. Tribal remedies have been exhausted, and we have the benefit of the tribal trial and appellate courts' opinions as well as that of the federal district court.

I would hold the tribal court has civil jurisdiction because of the presumption in favor of inherent tribal sovereignty, *Montana* applies only to issues involving fee lands, *Iowa Mutual* establishes more than a rule of exhaustion of tribal remedies, the Handbook of Federal Indian Law does not definitively resolve the issue, and

---

[1] Rights-of-way are part of "Indian country" as defined by federal law. 18 U.S.C. § 1151 ("Indian country" includes "all land within the limits of any reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"). "While [18 U.S.C.] § 1151 is concerned, on its face, only with criminal jurisdiction, the [Supreme] Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

state court jurisdiction does not preclude tribal court jurisdiction. Finally, I would hold that even if *Montana* applies, providing a forum for reservation-based tort actions, even where the parties are non-Indian, falls within both *Montana* exceptions.

INHERENT TRIBAL SOVEREIGNTY

The majority opinion would not extend inherent tribal sovereignty over the activities of non-members, absent consent or some direct effect on the tribe. I remain convinced that the opposite presumption applies, that is, that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (*Iowa Mutual*). *See Hinshaw v. Mahler*, 42 F.3d 1178, 1180-81 (9th Cir.) (tribal court jurisdiction over action brought by tribal member on behalf of non-tribal member child against non-tribal member arising out of car accident on reservation), *cert. denied*, 115 S. Ct. 485 (1994).

Indian tribes possess " 'inherent powers of a limited sovereignty which has never been extinguished.' " *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (emphasis omitted), *citing* Felix S. Cohen, Handbook of Federal Indian Law 122 (1942 ed.). The Supreme Court has repeatedly emphasized that "there is a significant geographical component to tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (pre-emption of state authority over non-Indians acting on tribal reservations). *See generally* Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The*

Supreme Court's Changing Vision, 55 U. Pitt. L. Rev. 1 (1993). Thus, "Indian tribes retain 'attributes of sovereignty over both their members *and their territory*' to the extent that sovereignty has not been withdrawn by federal statute or treaty." *Iowa Mutual*, 480 U.S. at 14, *citing United States v. Mazurie*, 419 U.S. 544, 557 (1975) (emphasis added). Inherent tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance. *But until Congress acts, the tribes retain their existing sovereign powers.* In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a *necessary* result of their dependent status." *United States v. Wheeler*, 435 U.S. at 323 (emphasis added). Implicit divestiture of inherent sovereignty has been found necessary only

> where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 153-54 (1980) (footnote omitted).

> The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute. "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the rights of reservation Indians to make their own laws and be ruled by them."

Iowa Mutual, 480 U.S. at 14, *citing Williams v. Lee*, 358 U.S. 217, 220 (1959). "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982).

There is no ground for divestiture of inherent tribal sovereignty in the present case. No specific treaty provision or federal statute has been shown to affirmatively limit the power of the tribal courts of the Three Affiliated Tribes over civil actions that arise on the reservation, and the exercise of tribal civil jurisdiction over a tort action arising on the reservation between non-members does not implicate foreign relations, alienation of land, or the criminal prosecution of non-Indians.

STATUS OF LANDS AT ISSUE

First, *Montana v. United States*, 450 U.S. 544 (1981), *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (*Brendale*), and *South Dakota v. Bourland*, 113 S. Ct. 2309 (1993) (*Bourland*), are not controlling. *Montana* and *Brendale* involved attempts by the tribes to regulate the activities of non-members on fee land, that is, land owned by non-members within the reservation; *Bourland* involved lands taken by the federal government for the construction of a dam and reservoir. The distinction between land conveyed in fee to non-Indians pursuant to the Indian General Allotment Act of 1887, 24 Stat. 388, which was intended to eliminate the reservations and assimilate the Indian peoples, or, in

Bourland, land taken by the federal government, and land owned by the tribe or trust land held by the federal government in trust for the tribe or individual members of the tribe, is fundamental to the analysis in *Montana*. *Brendale* and *Bourland*. The present case does not involve fee land or land taken by the federal government for public use. For that reason, I would apply *Montana*, and its exceptions, only to fee lands owned by non-tribal members.

A close reading of Justice Stewart's opinion for the Court in *Montana* demonstrates the importance of geographical or territorial status of the land at issue to tribal sovereignty analysis. The Court's analysis differentiated between fee lands and lands owned by the tribe or held in trust for the tribe. The competing regulatory authorities were the tribe and the state, each of which asserted the authority to regulate hunting and fishing by non-members within the reservation. The Court framed the issue in terms of "the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on *lands within its reservation owned in fee simple by non-Indians*." 450 U.S. at 547 (emphasis added), 557. The Supreme Court held that the tribe could prohibit non-members from hunting or fishing on land owned by the tribe or trust land, *id.* at 557, and, if the tribe permitted non-members to fish or hunt on such lands, could condition their entry by charging a fee or establishing bag and creel limits. *Id.* However, the Court held inherent tribal sovereignty over the reservation did not extend to tribal regulation of non-Indian fishing and hunting on reservation land owned in fee by non-members. *Id.* at 564-65. The

Court admitted that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations, even on non-Indian fee lands.*" *Id.* at 565 (emphasis added). The first *Montana* exception recognizes tribal regulatory authority over non-members who enter consensual relationships with the tribe or its members. *Id.* The second *Montana* exception expressly recognizes a tribe's "inherent power to exercise over the *conduct of non-Indians on fee lands within its reservation* when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* (emphasis added). If inherent tribal sovereignty can include civil jurisdiction over non-Indians on fee lands within the reservation, it should include civil jurisdiction over non-Indians on tribal land or trust land within the reservation. This is because tribal civil jurisdiction is more restricted on fee land than on tribal or trust land.

Brendale also involved fee lands within the reservation; the competing regulatory authorities were once again the tribe and the state (or, more precisely, one county). The issue presented was the scope of the second *Montana* exception, that is, "whether, and to what extent, the tribe has a protectible interest in what activities are taking place *on fee land within the reservation* and, if it has such an interest, how it may be protected." 492 U.S. at 430 (emphasis added). The tribal zoning ordinance applied to all lands located within the reservation, part of which was located in Yakima County. The county zoning ordinance applied to all lands located within the county, except for tribal trust lands. Most of the reservation was tribal trust land, referred to as the "closed area"; the rest

was fee land located through out the reservation in a checkerboard pattern but mostly in one part of the reservation, referred to as the "open area." The county had approved two proposed developments, one in the open area and one in the closed area, on fee lands owned by non-members of the tribe, that conflicted with the tribal zoning ordinance. The tribe sued to stop the proposed development and challenged the county's zoning authority over the reservation.

The judgment of the Court was divided. The Court, in an opinion by Justice White, upheld application of the county zoning ordinance to the fee land located within the open area, under both the treaty language, *id.* at 422-25, and the *Montana* inherent tribal sovereignty analysis. *Id.* at 425-32. However, the Court, in an opinion by Justice Stevens, upheld application of the tribal zoning ordinance to the fee land located within the closed area. *Id.* at 433-47 (differentiating between "essential character" of closed and open areas and noting open area was at least half-owned by non-members, had lost its character as an exclusive tribal resource, and, as practical matter, had become integrated part of county that is not economically or culturally delimited by reservation boundaries). Although the opinions reach different decisions for different reasons, it is important to note that the regulatory dispute involved the authority to control development of fee lands and not land owned by the tribe or held in trust for the tribe. *Cf. United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 906 (9th Cir. 1994) (*Montana* exceptions are "relevant only after the court concludes that there has been a general divestiture of tribal authority over non-indians by alienation of the

land"). Justice Blackmun would have upheld the tribe's exclusive authority to zone reservation land, including fee lands, and thus concurred in part and dissented in part. *Id.* at 448-68.

In *Bourland* the competing regulatory authorities were once again the tribe and the state. At issue were not fee lands, however, but former trust and fee lands that had been taken by the United States for construction of a dam and reservoir for flood control. The taking authorization also "opened" the taken land for recreational use, including hunting and fishing, by the public at large. As in *Montana*, the tribe sought to regulate hunting and fishing by non-members on the reservation, including the land taken for the flood control project. The state filed suit to enjoin the tribe from excluding non-Indians from hunting and fishing on the taken lands within the reservation. The Court, in an opinion by Justice Thomas, held that Congress, in enacting the flood control legislation, had abrogated the tribe's right under the relevant treaty to exclude non-Indians from the taken lands. 113 S. Ct. at 2316. The Court also held that inherent tribal sovereignty did not enable the tribe to regulate non-Indian hunting and fishing in the taken area in the absence of any evidence in the relevant treaties or statutes that Congress intended to allow the tribe to assert such regulatory jurisdiction. *Id.* at 2319-20. The Court, however, remanded the case for further consideration of whether the tribe retained the inherent sovereignty to regulate non-Indian hunting and fishing in the taken area under the two *Montana* exceptions. *Id.* at 2320. Justice Blackmun dissented and would have held that the tribe had the authority to regulate non-Indian hunting and fishing in

the taken area because the relevant statutes did not affirmatively abrogate either the tribe's treaty rights or inherent tribal sovereignty. *Id.* at 2323-24.

EXHAUSTION OF TRIBAL REMEDIES

Next, *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (*National Farmers Union*), and *Iowa Mutual* do not establish only a rule of exhaustion requiring tribal courts to determine their jurisdiction in the first instance. The rule of exhaustion established in *National Farmers Union* is premised upon the Court's decision that tribal civil jurisdiction over non-Indians is not automatically foreclosed by *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding federal legislation conferring jurisdiction on federal courts to try non-Indians for offenses committed in Indian country had implicitly pre-empted tribal criminal jurisdiction over non-Indians). *National Farmers Union* recognized that an exhaustion requirement would have been superfluous if there were no possibility of tribal civil jurisdiction over non-Indians. 471 U.S. at 854 (because if *Oliphant* applied, federal courts would always be the only forums for civil actions against non-Indians). *National Farmers Union* thus did not foreclose tribal court jurisdiction over a civil dispute involving a non-Indian defendant. *Id.* at 855 (school district defendant). *Iowa Mutual* not only reaffirmed the rule of exhaustion established in *National Farmers Union* but also expressly stated that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty" and that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision

or federal statute." 480 U.S. at 18; *see Brendale*, 492 U.S. at 454-55 n.5 (Blackmun, J., concurring in part and dissenting in part). This is an affirmative recognition that tribal court civil jurisdiction over reservation-based tort actions against non-Indians is part of inherent tribal sovereignty. Otherwise, there would be no point in requiring exhaustion of tribal remedies to permit the tribal courts to evaluate the factual and legal bases of any challenges to their jurisdiction because the tribal courts would never have jurisdiction.

HANDBOOK OF FEDERAL INDIAN LAW

The landmark treatise does not definitively resolve this issue. As noted by the majority opinion, Felix S. Cohen's Handbook of Federal Indian Law 342-43 (1982 ed.) does state that "[t]ribal courts probably lack jurisdiction over civil cases involving only non-Indians in most situations, since it would be difficult to establish any direct impact on Indians or their property." However, another section of the Handbook supports tribal civil jurisdiction over non-Indians:

> Indian tribes retain civil regulatory and judicial jurisdiction over non-Indians. The extent of tribal civil jurisdiction over non-Indians, however, is not fully determined.
>
> Analysis of the actions of each of the three federal branches demonstrates that civil jurisdiction over non-Indians has not been withdrawn and that the exercise of such jurisdiction is consistent with the tribes' dependent status under federal law. . . . In the civil field [contrary to the rule in criminal matters], Congress has

never enacted general legislation to supply a federal or state forum for disputes between Indians and non-Indians in Indian country. Furthermore, although treaties between the federal government and Indian tribes sometimes required tribes to surrender non-Indian criminal offenders to state or federal authorities, Indian treaties did not contain provision for tribal relinquishment of civil jurisdiction over non-Indians. Congress' failure to regulate civil jurisdiction in Indian country suggests both that there was no jurisdictional vacuum to fill and that Congress was less concerned with tribal civil, non-penal jurisdiction over non-Indians than with tribal jurisdiction over the personal liberty of non-Indians.

The executive branch of the federal government has long acted on the assumption that Indian tribes may subject non-Indians to civil jurisdiction. Although the Attorney General and the Solicitor of the Department of the Interior have opined since 1834 that Indian tribes lack criminal jurisdiction over non-Indians, several opinions have upheld tribal civil jurisdiction. The Attorney General sustained tribal civil jurisdiction in 1855. A comprehensive 1934 Opinion of the Solicitor of the Department of the Interior concluded that "over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business." . . .

. . . .

> The breadth of [the tribes'] retained power over non-Indians in civil matters has not been finally resolved. . . .
>
> . . . .
>
> A tribe presumptively has an interest in activities on lands belonging to the tribe or its members, so tribal control over Indian trust land can be the basis for extensive tribal jurisdiction over non-Indians in civil matters. Regardless of land ownership, tribal jurisdiction within reservations can also be based on transactions between non-Indians and Indians or tribes or on non-Indian activities that directly affect Indians or their property.

Id. at 253-57 (footnotes omitted). Neither excerpt definitively resolves the issue of tribal court jurisdiction over a civil suit brought against a non-Indian arising from a tort occurring on the reservation.

STATE COURT JURISDICTION

The possibility of state court jurisdiction does not preclude tribal court jurisdiction. *See Hinshaw v. Mahler*, 42 F.3d at 1180 (concurrent state and tribal jurisdiction over certain civil matters occurring on Flathead Reservation, including operation of motor vehicles on public roads), *citing Larivee v. Morigeau*, 184 Mont. 187, 602 P.2d 563, 566-71 (1979) (same), *cert. denied*, 445 U.S. 964 (1980). However, tribal court jurisdiction may preclude state court jurisdiction, particularly where the tribe has established tribal courts and adopted a tribal code which provides for personal jurisdiction over non-Indians, subject matter jurisdiction over torts arising on the reservation,

and application of tribal law. This is particularly true if one views the issue in terms of a state's attempt to assert its civil authority over the conduct of non-Indians on the reservation, which is usually denied, *see e.g., Williams v. Lee*, 358 U.S. 217, as opposed to a tribe's attempt to assert its civil authority over the conduct of non-Indians on the reservation, which is usually upheld. *See, e.g., City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 558 (8th Cir. 1993) (reserving inher[illegible]al soverignty issue), *cert. denied*, 114 S. Ct. 2741 (1994). For example, in the landmark case of *Williams v. Lee* the Court held that the state court did not have jurisdiction over an action brought by a non-Indian who operated a general store on a reservation to recover money for goods sold to Indians because "the exercise of state jurisdiction [under the circumstances] would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 358 U.S. at 223; *cf. Cowan v. Rosebud Sioux Tribe*, 404 F. Supp. 1338, 1341 (D.S.D. 1975) (upholding tribal court jurisdiction over tribe's suit against non-Indian lessee of tribal land).

TRIBAL SELF-GOVERNMENT

Finally, even assuming for purposes of analysis that *Montana* is not limited to disputes involving fee lands, a "consensual relationship" existed between A-1 and Stockert and the tribe by virtue of the subcontract within the meaning of the first *Montana* exception. In addition, the allegedly tortious conduct of A-1 and Stockert occurred on a state highway right-of-way on the reservation. This conduct by non-Indians within the reservation threatened

the tribe's interest in the safe operation of motor vehicles on the roads and highways on the reservation. *See Hinshaw v. Mahler*, 42 F.3d at 1180; *cf. Sage v. Lodge Grass School District No. 27*, 13 Indian L. Rep. 6035, 6039 (Crow Ct. App. 1986) (remand following *National Farmers Union*; student hit by motorcycle on school parking lot; tribe has legitimate interest in protecting health and safety of school children attending school within reservation). The tribe also has an interest in affording those who have been injured on the reservation with a judicial forum. This interest is admittedly abstract compared to the safe operation of motor vehicles. However, disregarding the jurisdiction of tribal courts, which play a vital role in tribal self-government, undermines their authority over reservation affairs and to that extent imperils the political integrity of the tribe.

For these reasons, I would affirm the order of the district court holding the tribal court has subject matter jurisdiction over this reservation-based tort action between non-tribal members.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3359NDBI

A-1 Contractors, et al.,	*	No. 92-3359 NDBI
Appellants,	*	Appeal from the United
vs.	*	States District Court for the
	*	District of North Dakota
Honorable William Strate, etc., et al.,	*	ORDER
	*	ENTERED
Appellees.	*	JANUARY 9, 1995

Appellants' petition for rehearing has been considered by the court and is granted. The opinion and judgment of the court entered on November 29, 1994, are vacated.

The argument date will be fixed by a later order of this court.

January 9, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3359

A-1 Contractors; Lyle Stocker, Appellants, v. Honorable William Strate, Associate Tribal Judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation; Three Affiliated Tribes of the Berthold Indian Reservation, The Tribal Court; Lyndon Benedict Fredericks; Kenneth Lee Fredericks; Paul Jonas Fredericks; Hans Christian Fredericks; Jeb Pius Fredericks; Gisela Fredericks, Appellees.	Appeal from the United States District Court for the District of North Dakota

---

Submitted: June 16, 1993

Filed: November 29, 1994

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and HANSEN, Circuit Judge.

McMILLIAN, Circuit Judge.

A-1 Contractors and Lyle Stockert appeal from a final order entered in the District Court[1] for the District of North Dakota denying their motion for summary judgment and granting summary judgment in favor of appellees, the Fredericksses and the tribal defendants (described further below). *A-1 Contractors v. Strate*, Civil No. A1-92-24 (D.N.D. Sept. 17, 1992) (*Strate*). For reversal, appellants argue the district court erred in holding the tribal court had subject matter jurisdiction over this civil cause of action between non-Indians that arose on an Indian reservation. Appellants argue that although the tribe retains sovereignty to control its own internal relations, it has been divested of any authority over non-members' activities that do not substantially affect those internal relations. For the reasons discussed below, we affirm the order of the district court granting summary judgment in favor of appellees and reserving the matter for tribal court jurisdiction.

I.

On November 9, 1990, Stockert was driving a gravel truck owned by A-1 Contractors when the truck collided with a car driven by Gisela Fredericks. Mrs. Fredericks suffered serious injuries which required her to be hospitalized for 24 days. In May 1991 Mrs. Fredericks and her adult children (collectively referred to as the Fredericksses) sued appellants and Continental Western

---

[1] The Honorable Patrick A. Conmy, United States District Judge for the District of North Dakota.

Insurance Co.[2] in the Tribal Court for the Three Affiliated Tribes[3] of the Fort Berthold Indian Reservation seeking damages in excess of $13 million for personal injury, loss of consortium and medical expenses.

At the time of the accident, appellants were working on the reservation under a subcontract agreement with LCM Corp., a corporation wholly owned by the tribe. Under the subcontract, appellants did certain excavating, berming and recompacting work in connection with the construction of a tribal community building. All of appellants' work under the subcontract was performed within the boundaries of the reservation. Appellants are not members of the tribe nor residents of the reservation. Mrs. Fredericks is a non-tribal member resident of the reservation.[4]

Appellants made a special appearance in tribal court and moved to dismiss the action for lack of personal and subject matter jurisdiction. The tribal court denied the motion and found it had personal and subject matter

---

[2] Continental Western Insurance Co., A-1 Contractors' insurer, was a party to the proceedings before the tribal court and the tribal appellate court; however, on February 3, 1992, the insurer was dismissed as a defendant in the district court without prejudice and is not a party to this appeal.

[3] The Three Affiliated Tribes – Mandan, Hidatsa and Arikara – are federally recognized Indian tribes (hereinafter "the tribe") which exercise their sovereignty under a federally approved constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479.

[4] Although Mrs. Fredericks is not a member of the tribe, her late husband was a tribal member and her adult children are enrolled members of the tribe.

jurisdiction. *Fredericks v. Continental Western Insurance Co.*, No. 5-91-A04-150, slip op. at 1.24(d) (Fort Berthold Tribal Ct. Sept. 4, 1991) (*Fredericks I*). Specifically, the tribal court found it had personal jurisdiction over the parties based on Chapter 1, section 3 of the Tribal Code because Mrs. Fredericks is a resident of the reservation and because appellants "entered and transacted business within the territorial boundaries of the Reservation." *Id.* at 1.24(c). The tribal court also determined that it had subject matter jurisdiction over the action as an incident of inherent tribal sovereignty unlimited by treaty or federal statute. *Id.* at 1.24(d) (invoking the second *Montana* exception).

Appellants then appealed to the Northern Plains Intertribal Court of Appeals, which affirmed the decision of the tribal court. *Fredericks v. Continental Western Insurance Co.*, Northern Plains Intertribal Ct. App. (Jan. 8, 1992) (*Fredericks II*). The tribal court of appeals remanded the case to the tribal court for further proceedings. No further proceedings had occurred in tribal court when appellants filed a complaint in federal district court on February 5, 1992, against the Frederickses and the Honorable William D. Strate, Associate Tribal Judge for the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, and the tribal court (hereinafter referred to as the tribal defendants). Appellants sought declaratory relief and to enjoin the Frederickses from proceeding against them in tribal court and to enjoin the tribal defendants from asserting jurisdiction over them.

The tribal defendants answered and initially raised the affirmative defense of sovereign immunity; however,

the tribal defendants later consented to suit for the limited purpose of defending the federal law claims for injunctive relief. Appellants, the Frederickses and the tribal defendants filed motions for summary judgment on the issue of tribal court jurisdiction. The district court denied appellants' motion and granted the Frederickses' and the tribal defendants' cross-motions for summary judgment. *Strate*, slip op. at 10. The district court first decided that the only factual dispute was whether Mrs. Fredericks resided on or off the reservation and that this factual dispute was irrelevant to the issue of tribal court jurisdiction. *Id.* at 5. The district court then decided that the tribal court had both personal and subject matter jurisdiction, even though none of the parties was a tribal member, finding that tribal courts have jurisdiction over civil causes of action between non-Indians that arise on the reservation unless specifically limited by treaty or federal statute and no such limitation was shown to apply here. *Id.* at 9-10. This appeal followed.

II.

We review the grant or denial of summary judgment de novo. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the party moving for summary judgment is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992); *Ford v. Dowd*, 931 F.2d 1286, 1289 (8th Cir. 1991).

Specifically, we must determine whether the district court correctly decided that the tribal court had subject matter jurisdiction to hear the present case. Tribal court jurisdiction is a question of federal law reviewed de novo. *Stock West Corp. v. Taylor*, 964 F.2d 912, 917 (9th Cir. 1992) (banc); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313-14 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991).

Appellants argue the district court erred in holding there is tribal court jurisdiction because the limited inherent sovereignty retained by Indian tribes in their dependent status does not include the power to exercise civil jurisdiction over actions between non-Indians. Appellants cite in support *Montana v. United States*, 450 U.S. 544 (1981) (*Montana*), *United States v. Wheeler*, 435 U.S. 313 (1978) (*Wheeler*), and *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (*Brendale*).

In *Montana* the issue was whether the tribe had the authority to prohibit non-Indians from hunting and fishing on fee lands owned by non-Indians within its reservation. The Supreme Court held that it did not. The Court began its analysis by noting that although "Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory,' . . . through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty." 450 U.S. at 563, *citing Wheeler*, 435 U.S. at 323, 326. Although in general the tribes have lost the inherent sovereign power over the activities of nonmembers, the Court noted that "Indian tribes retain inherent

sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U.S. at 565. First, the tribe may retain the inherent sovereign power to "regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* (first *Montana* exception). In addition, the tribe may retain the inherent power to "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (second *Montana* exception).

Appellants argue that the two *Montana* exceptions are the only bases upon which the tribal court may assert jurisdiction over civil disputes between non-Indians and that the present case does not fit within either exception. Appellants argue that they, Mrs. Fredericks and her adult children have not entered into any agreements or dealings with the tribe in connection with the underlying tort action so as to subject themselves to tribal court jurisdiction within the meaning of the first *Montana* exception. Appellants also argue that the underlying tort does not so threaten the tribe's political or economic security so as to warrant tribal court jurisdiction within the meaning of the second *Montana* exception.

The Frederickses and the tribal defendants argue the district court correctly held that the tribal court did have jurisdiction over a civil action brought by a non-Indian against another non-Indian arising from a tort occurring on the reservation. They argue that the tribe has retained

the inherent sovereign authority to exercise civil jurisdiction over the conduct of appellants on the reservation, notwithstanding that appellants and Mrs. Fredericks are non-tribal members, because appellants' allegedly tortious conduct had a direct effect on the welfare of the tribe. They argue that because the tort action arose on the reservation, tribal court jurisdiction is presumed and exists "unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 14, 18 (1987) (*Iowa Mutual*); *see also Williams v. Lee*, 358 U.S. 217, 223 (1959); *Stock West Corp. v. Taylor*, 964 F.2d at 918-19.

The Frederickses and the tribal defendants argue that *Montana* is inapplicable to the present case. They argue that *Montana* is limited to the issue of tribal civil jurisdiction over fee lands owned by non-Indians within the reservation and the present case does not involve fee lands owned by non-Indians. However, assuming *Montana* is applicable, they argue that both the first and second *Montana* exceptions apply and support tribal court jurisdiction in the present case. The Frederickses and the tribal defendants argue there was a consensual relationship between appellants and the tribe pursuant to the subcontract between the tribal corporation, LCM Corp., and appellants, thus satisfying the first *Montana* exception. They argue appellants voluntarily entered into the subcontract with the tribe in which appellants recognized tribal authority. All of appellants' work under the subcontract was to be performed on the reservation. In addition, they argue the allegedly tortious conduct of appellants occurred on the reservation and thus directly affected the economic security and health and general

welfare of the tribe. They argue that when a tort action arises within a reservation, especially on tribal trust land, the second *Montana* exception is satisfied.

III.

We hold the district court did not err in holding the tribal court had subject matter jurisdiction. As a preliminary matter, we note that the present case involves the issue of tribal court jurisdiction on the merits. The present case does not involve exhaustion of tribal remedies or federal court abstention. *See, e.g., Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1299-1300 (8th Cir. 1994) (*Duncan Energy*), *petition for cert. filed*, 63 U.S.L.W. 3326 (U.S. Oct. 17, 1994) (No. 94-689). Here, tribal remedies have been exhausted. We have the benefit of the tribal courts' expertise and analysis, consistent with the federal government's long-standing policy of supporting tribal self-government, including tribal courts, and tribal self-determination. *See Iowa Mutual*, 480 U.S. at 14; *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845, 856 (1985). Nor does the present case involve tribal *criminal* jurisdiction. *Duro v. Reina*, 495 U.S. 676, 688 ((1990) (tribal court cannot exercise criminal jurisdiction over non-tribal member); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978) (tribal court cannot exercise criminal jurisdiction over non-Indians). As noted earlier, the question of tribal court jurisdiction is a question of federal law which we review de novo. *Duncan Energy*, 27 F.3d at 1300.

We agree with the district court and the tribal courts that *Montana* and *Brendale* are not dispositive. We hold

that *Montana*, and the *Montana* exceptions, are inapplicable to the present case. We think the general divestiture of tribal civil jurisdiction over the activities of non-Indians recognized in *Montana* is applicable only to fee lands owned by non-Indians. *Montana* involved tribal regulation of fee lands; the Court's opinion framed the issue in terms of "the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on *lands within its reservation owned in fee simple by non-Indians.*" 450 U.S. at 547 (emphasis added), 557. *Brendale* also involved tribal regulation of fee lands. The issue was the scope of the second *Montana* exception, that is, "whether, and to what extent, the tribe has a protectible interest in what activities are taking place on *fee land* within the reservation and, if it has such an interest, how it may be protected." 492 U.S. at 430 (emphasis added). The Court noted that fee land was located through the reservation in a checkerboard pattern, *id.* at 421, and recognized that "in the special circumstances of checkerboard ownership of lands within a reservation, the tribe has an interest under federal law, defined in terms of the impact of the challenged uses [of fee land] on the political integrity, economic security, or the health or welfare of the tribe." *Id.* at 430-31 (referring to second *Montana* exception). *See South Dakota v. Bourland*, 113 S. Ct. 2309, 2316-17 (1993) (tribe could not regulate activities of non-tribal members on non-Indian fee lands on reservation, that is, land taken for dam project and then opened for public use as recreation area); *Brendale*, 492 U.S. at 427, 430 ("The governing principle [in *Montana*] is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee

land."); *United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 906 (9th Cir. 1994) (*Montana* exceptions are "relevant only after the court concludes that there has been a general divestiture of tribal authority over non-Indians by alienation of the land"); *Duncan Energy*, 27 F.3d at 1298; *cf. Stock West Corp. v. Taylor*, 964 F.2d at 920 (tortious acts committed on reservation land, business transactions commenced on tribal lands); *Red Fox v. Hettich*, 494 N.W.2d 638, 645-47 (S.D. 1993) (holding plaintiff failed to establish tribal court had jurisdiction over tort claim which occurred on state highway within reservation).

"Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual*, 480 U.S. at 18, *citing Montana*, 450 U.S. at 565-66, *Washington v. Confederated Tribes*, 447 U.S. 134, 152-53 (1980) (tribes may tax transactions occurring on tribal trust lands), *and Fisher v. District Court*, 424 U.S. 382, 387-89 (1976); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (holding tribe may impose taxes on business operated by non-Indians on basis of tribe's inherent sovereign authority to control economic activity within its jurisdiction); *Williams v. Lee*, 358 U.S. at 223 (state court did not have jurisdiction over civil suit by non-Indian against Indian where cause of action arose on reservation). "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that

the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 149 n.14. In the present case no specific treaty provision or federal statute has been shown to have affirmatively limited the power of the tribal courts over civil actions that arise on the reservation between non-Indians. We therefore hold the tribal court does have subject matter jurisdiction.

IV.

In the alternative, assuming for purposes of analysis that *Montana* is not limited to tribal authority over non-Indian fee lands, we agree with the district court and the tribal courts that the tribe retained the inherent sovereign authority to exercise civil jurisdiction over the activities of non-Indians within the reservation under both the first and second *Montana* exceptions. With respect to the first *Montana* exception, a "consensual relationship" existed between appellants and the tribe by virtue of the subcontract between A-1 and LCM Corp., a corporation wholly-owned by the tribe. The allegedly tortious conduct also occurred in connection with the performance of that subcontract on the reservation. Appellants thus subjected themselves to the civil jurisdiction of the tribal court.

With respect to the second *Montana* exception, the present case involved an automobile accident that occurred on a state highway right-of-way on the reservation. As noted above, territorial control is an fundamental component of inherent tribal sovereignty. Rights-of-way are part of "Indian country" as defined by federal law. 18 U.S.C. § 1151 ("Indian country" includes "all land within

the limits of any reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"). "While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). The definition has been applied in a variety of contexts. *See, e.g., City of Timber Lake v. Cheyenne Sioux River Tribe*, 10 F.3d 554, 556-57 (8th Cir. 1993) (holding tribe can regulate liquor sales on fee lands owned by non-Indians within reservation), *cert. denied*, 114 S. Ct. 2741 (1994); *Red Fox v. Hettich*, 494 N.W.2d at 643 & n.7 (state highway within reservation); *Schantz v. White Lightning*, 231 N.W.2d 812, 815 (N.D. 1975) (holding state court did not have jurisdiction of civil action brought by non-Indian against Indian for injuries resulting from auto accident which occurred on state highway within reservation); *cf. Swift Transportation, Inc. v. John*, 546 F. Supp. 1185, 1191-92 (D. Ariz. 1982) (holding U.S. highway right-of-way equivalent to non-Indian fee land within meaning of Montana in light of Indian Rights-of-Way Act, 25 U.S.C. §§ 323-328), *decision vacated and injunction dissolved*, 574 F. Supp. 710 (1983). For example, this court is familiar with the conflict between state and tribal law enforcement on state highways on reservations. *See Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990) (holding state had no civil or criminal jurisdiction over highways running through Indian country), *cert. denied*, 500 U.S. 915 (1991).

We think the tribe, like a state, has an important and legitimate interest in protecting the health and safety of

its members and residents on the roads and highways on the reservation. In addition, we think the tribe, like a state, also has an important and legitimate interest in affording those who have been injured in accidents on those roads and highways with a judicial remedy. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978). Whether the tribal court has subject matter jurisdiction is not controlled by whether the applicable substantive law is tribal law or state law or federal law. Courts often adjudicate disputes under substantive law different than that of the forum. Tribal court jurisdiction is an important aspect of tribal sovereignty, and refusing to recognize its existence would have a demonstrably serious, adverse effect on the political integrity of the tribe.

Accordingly, we affirm the order of the district court granting summary judgment to appellees and reserving the matter for tribal court resolution on the merits.

HANSEN, Circuit Judge, dissenting.

Because the court's opinion departs from the well-established test for determining a tribal court's civil jurisdiction over non-Indian parties, I respectfully dissent. The court finds tribal court jurisdiction is appropriate here under what can best be described as a theory of "tribal territorial jurisdiction," which I believe is wholly unsupported by authority. I believe this case is controlled by *Montana v. United States*, 450 U.S. 544 (1981), and its

requirement that a tribal interest be involved before a tribal court may assert jurisdiction.

In *Montana,* the Supreme Court of the United States set forth the test for determining when an Indian tribe has jurisdiction over non-Indian parties. The Court found that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without express Congressional delegation." *Id.* at 564 (citations omitted). The Court went on to find that "Indian tribes retain inherent sovereign authority to exercise *some* forms of civil jurisdiction over non-Indians on their reservations." *Id.* at 565 (emphasis added). As the majority points out at page 6, the *Montana* Court described the two situations where this jurisdiction arises: (1) when nonmembers "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or (2) when "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66 (citations omitted). This analysis of civil tribal jurisdiction over non-Indians has been reiterated a number of times by the Supreme Court. *See South Dakota v. Bourland,* 113 S. Ct. 2309, 2319 (1993) (quoting *Montana's* observation that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal tribal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation"); *Duro v. Reina,* 495 U.S. 676, 687 (1990) (reciting *Montana's* observation that "the inherent sovereign powers of an Indian

tribe do not extend to the activities of nonmembers of the tribe" and that civil tribal jurisdiction over non-Indians on the reservation typically involves situations arising from property ownership within the reservation or the "consensual relationships" outlined in *Montana*); *Brendale v. Confederated Yakima Indian Nation,* 492 U.S. 408, 426-27 (1989) (plurality) (following *Montana* principles and finding no tribal interest which allowed the tribe to exercise authority over nonmembers on fee lands within the reservation).

The court attempts to distinguish *Montana* and *Brendale* by placing an artificial limitation on their reasoning. It contends that *Montana* and *Brendale* apply only to a tribe's ability to exercise authority over non-Indians' activities on fee lands within the boundaries of the reservation. While both of these cases do address questions of tribal authority over non-Indians on fee lands, neither case limits its discussion or rationale to jurisdictional issues arising on fee lands.

The *Montana* case found, without qualification or caveat, that *tribal power* may not reach beyond what is necessary to protect tribal self-government or to control internal relations absent express congressional delegation. 450 U.S. at 564 (emphasis added). *Montana* also specifically addressed the "forms of civil jurisdiction over non-Indians *on their reservations*" and provided the two situations in which that jurisdiction may arise. *Id.* at 565 (emphasis added). The *Brendale* case expressly adopted the *Montana* rationale without further qualification. *See Brendale,* 492 U.S. at 426-27. Moreover, a number of cases also have cited to *Montana* in analyzing civil jurisdictional issues in non-fee land disputes. *See Stock West Corp. v.*

Taylor, 964 F.2d 912, 918-19 (9th Cir. 1992) (en banc) (quoting *Montana* test in non-fee land jurisdictional dispute); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990) (citing *Montana* in non-fee land case as "the leading case on tribal civil jurisdiction over non-Indians"); *see also Tamiani Partners Ltd. v. Miccosukee Tribe of Indians of Florida*, 999 F.2d 503, 508 n.11 (11th Cir. 1993) (citing *Montana* in recognizing that tribal courts have power to exercise civil jurisdiction in conflicts affecting the *interests of Indians* on Indian lands). Our court's attempt to limit the rationale of *Montana* and *Brendale* to fee land jurisdictional issues is both uncompelling and unsupported by the language of these cases.

Instead of relying on the well-established principles of *Montana* (adopted in *Brendale*), the majority pins its finding of tribal jurisdiction in this case on the concept that Indian tribes retain unfettered territorial civil jurisdiction unless that jurisdiction has been affirmatively limited by federal law, and the majority finds no such affirmative limitation here. The majority concludes that the tribe retains sovereignty over all matters arising on tribal land unless and until that jurisdiction is limited (i.e., divested) by federal law. This near statehood-like conclusion essentially adopts the position of counsel for the tribal defendants who stated in oral argument that the tribe wants "to have jurisdiction over things that happen on the reservation," including things that involve non-Indians, because "that's what sovereign governments do, they control things that happen within their territory." I find this concept of plenary tribal territorial jurisdiction to be wholly unsupported by authority, an overly broad

interpretation of the tribe's sovereignty which is inconsistent with the tribe's dependent status and contrary to the law the Supreme Court set forth in *Montana*.

The majority attempts to support this idea of sovereign "tribal territorial jurisdiction" by relying on isolated language from *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), *Williams v. Lee*, 358 U.S. 317 (1959), and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), in reaching the conclusion that tribes have retained "tribal territorial jurisdiction." None of these cases support the majority's finding of tribal civil jurisdiction. Our court's reading of *Iowa Mutual*, on which its opinion primarily relies, is unnecessarily broad and conflicts with the principles of *Montana*. *Iowa Mutual* can and should be read more narrowly and in harmony with the principles set forth in *Montana*. Contrary to the majority's characterizations, the Court in *Iowa Mutual* simply holds that exhaustion of tribal remedies is required before a federal district court can decide the issue of federal court jurisdiction. In *Brendale*, the plurality specifically observed that *Iowa Mutual* only established an exhaustion rule and did not decide whether the tribe had jurisdiction over the nonmembers involved. *Brendale*, 492 U.S. at 427 n.10.

In reaching its conclusion on the exhaustion requirement, the *Iowa Mutual* Court went on to offer the following observation which the majority relies heavily upon in reaching its decision:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981) [other citations omitted]. Civil jurisdiction over such activities

> presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.

Id. at 18. The majority asserts that because there is no act of Congress which purports expressly to divest the tribe of its jurisdiction in this matter, jurisdiction remains in the tribal court.

The Supreme Court's observation in *Iowa Mutual* should be read within the parameters of *Montana*, which is cited by the Court in making the observation. When the Court observes that "[t]ribal authority over the *activities* of non-Indians on reservation lands is an important part of tribal sovereignty," the Court is referring to the type of activities, like consensual contractual relationships, that give rise to tribal authority under *Montana*. Likewise, when the Court goes on to say "[c]ivil jurisdiction over *such activities* presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute," the Court is again referring to the civil jurisdiction the tribe possesses over non-Indians by virtue of the non-Indian's activities which give rise to tribal jurisdiction under *Montana*. We recently read the *Iowa Mutual* case in just such a fashion stating: "Civil jurisdiction over *tribal-related* activities on reservations presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or by federal statute." *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1299 (8th Cir. 1994) (emphasis added) (citing *Iowa Mutual*, 480 U.S. at 18). Hence, *Iowa Mutual* should not be read to expand the category of activities which *Montana* finds give rise to tribal jurisdiction over non-Indians or nonmembers.

The other cases upon which the majority relies also should be read within the limits of *Montana*. In *Williams*, the plaintiff was a store owner on the reservation and sued the defendants who were members of the tribe for breach of contract based on a transaction that occurred on the reservation. This fits squarely under the "consensual agreement" test for jurisdiction in *Montana*. Hence, jurisdiction was appropriate under the *Montana* principles without resort to the concept of tribal territorial jurisdiction.

Similarly, the majority reads too much into the footnote language in *Merrion*, where the Court stated the very general notion that "the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government. . . . " 455 U.S. at 149 n.14. The Court made the observation in a footnote without any further discussion about what are the "inherent attributes of sovereignty" which the Court had previously described. It is clear that the sovereignty the American Indian tribes retain is a *limited* sovereignty consistent with their dependent status. *See Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1477 (8th Cir. 1994) (quoting *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 248 (8th Cir. 1993) (quoting *United States v. Wheeler*, 435 U.S. 313, 322 (1978))). As the Court specifically noted in *Montana*, "the inherent sovereign powers do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565, *quoted in Duro v. Reina*, 495 U.S. at 687. Thus, for the tribe to exercise jurisdiction over nonmembers, the *Montana* exceptions must be satisfied because the "inherent attributes of sovereignty" do not extend to nonmembers.

A careful reading of the *Iowa Mutual*, *Williams*, and *Merrion* cases thus indicates that they can and should be read together with *Montana* to establish one comprehensive and integrated rule: a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law. This rule is supported by the above authority and the leading treatise on American Indian law which specifically states: "Tribal courts probably lack jurisdiction over civil cases involving only non-Indians in most situations, since it would be difficult to establish any direct impact on Indians or their property." *Felix S. Cohen's Handbook of Federal Indian Law* 342-43 (1982 ed.). This well-accepted rule should be applied here.

Applying this rule, I believe that this court should first determine if there is a tribal interest involved in this case under *Montana*. I can find no tribal interest in this case which supports the tribal court's jurisdiction. This dispute arose between two non-Indians involved in an ordinary run-of-the-mill automobile accident that occurred on a North Dakota state highway traversing the reservation. The defendants have alleged that the "consensual relationship" test under *Montana* is satisfied because A-1 voluntarily entered into a subcontract with the tribe, and Lyle Stockert was an A-1 employee who was allegedly on the reservation pursuant to that contract

when he was involved in the accident with Gisela Fredericks.[1] That reasoning is flawed because the dispute in this case is a simple personal injury tort claim arising from an automobile accident, not a dispute arising under the terms of, or out of, or within the ambit of the "consensual agreement," i.e., the subcontract, between the tribe and A-1. Gisela Fredericks was not a party to the contract, and the tribe is a stranger to the accident.

The defendants also allege that the second exception under *Montana* is satisfied because the dispute arose within the reservation and, therefore, the conduct in issue here affects the tribe's political integrity and welfare. I disagree. This case has nothing to do with the Indian tribe's ability to govern its own affairs or protect its own people's rights under tribal laws and customs. It deals only with the conduct of non-Indians and nonmembers and the tribe's self-asserted ability to exercise plenary judicial authority over a decidedly nontribal matter. I find nothing in this case even approaching a direct effect on the tribe's political integrity or welfare. Hence, there is no tribal jurisdiction under *Montana*.

In adopting what amounts to a concept of "tribal territorial jurisdiction," the majority is exalting the situs of the event above the tribal interest requirement set forth in *Montana*. Simply stated, this case is not about the tribe's ability to govern itself: it is about the tribe's claimed ability to govern others who are non-Indians and

---

[1] There is no proof (as opposed to allegations) that I can find in the record to support the district court's finding of fact that A-1 was in performance of the contract at the time of the accident.

nonmembers of the tribe just because they enter the tribe's territory. By remaining within the principled approach of *Montana*, the tribe's ability to govern itself is inherently maintained because the tribal court will have jurisdiction any time a "tribal interest" in a dispute is established. Under *Iowa Mutual*, where such a tribal interest exists, the jurisdiction is broad and requires an affirmative change in federal law to limit it in any way. However, because I find that the majority incorrectly applies the relevant authority and because there is no tribal interest involved in this case, I respectfully dissent from the court's decision finding civil tribal jurisdiction over this dispute.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

A-1 Contractors, and Lyle Stockert, Plaintiffs,	)	
v	)	Civil No.
Honorable William D. Strate, Associate Tribal Judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthhold Indian Reservation, The Tribal Court of the Three Affiliated tribes of the Fort Berthold Indian Reservation, Lyndon Benedict Fredericks, Kenneth Lee Fredericks, Paul Jonas Fredericks, Hans Christian Fredericks, Jeb Pius Fredericks, Kenneth Lee Fredericks on behalf of Gisela Fredericks, and Gisela Fredericks, Defendants.	)	A1-92-24

MEMORANDUM AND ORDER

(Filed Sep. 16, 1992)

This is an action for declaratory and injunctive relief brought by A-1 Contractors and its employee, Lyle Stockert, defendants in a Tribal Court action, against the Tribal Court Judge, the Tribal Court and the plaintiffs in the Tribal Court action. A-1 and Stockert challenge the Tribal Court's assumption of jurisdiction over a tort action

resulting from automobile collision which occurred on the reservation.

This court has jurisdiction under 28 U.S.C. § 1331, to determine the extent of Tribal Court jurisdiction, since A-1 has exhausted Tribal Court remedies pursuant to the rule in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). Additionally, the Tribal defendants have consented to jurisdiction for the limited purpose of defending the federal law claims for the injunctive relief sought in this action.

The parties have filed summary judgment motions on the issue of Tribal Court jurisdiction. Also before the court is a motion to strike certain exhibits and a motion to amend complaint.

FACTS

On November 9, 1990, Gisela Fredericks was involved in an automobile accident with a gravel truck owned by A-1 Contractors and driven by Lyle Stockert. The parties agree the accident occurred north of Twin Buttes, North Dakota, on North Dakota State Highway 8, within the exterior boundaries of the Fort Berthold Reservation. At the time of the collision, A-1 was performing under a contract it had with a tribal-owned corporation.

Fredericks suffered extensive injuries, and incurred medical bills in the amount of $30,000. Although Fredericks is not an enrolled member of the tribe, she owns property on the reservation, her deceased husband was an enrolled member and her five children are enrolled members. The facts are in dispute as to whether or not

Fredericks resides on the reservation. Stockert is not a member of the tribe and A-1 is a North Dakota corporation.

Fredericks and her five children brought an action in the Tribal Court of the Three Affiliated Tribes against A-1 and Stockert, seeking damages for personal injuries and for loss of consortium. A-1 filed a motion to dismiss for lack of personal and subject matter jurisdiction.

The Tribal Court denied the motion to dismiss, finding that the tribal code authorized Tribal Court jurisdiction over the parties. The Tribal Judge reasoned that Gisela Fredericks, as a resident of the Fort Berthold Reservation, has the right to avail herself on the Tribal Court system to prosecute any claims which arose within the reservation boundaries. The Tribal Court also found that jurisdiction was proper over A-1 contractors, because it entered upon and transacted business within the territorial boundaries of the reservation.

The Tribal Court concluded that A-1 Contractors failed to identify any federal law, treaty provision or provisions of the United States Constitution which would preclude exercise of jurisdiction by the Tribal Court. The Tribal Court opinion was affirmed by the Northern Plains InterTribal Court of Appeals.

A-1 Contractors then brought an action in federal court, requesting this court to issue an order declaring that Tribal Court does not have jurisdiction over the case and enjoin the Fredericks from proceeding against A-1 contractors in Tribal Court.

The issue presented is whether or not the Tribal Court has personal and subject matter jurisdiction over a tort action arising from an automobile accident occurring on the reservation between two non-Indians.

ANALYSIS

Summary judgment is only appropriate when there is no genuine issue of materia! fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment should not be granted unless the moving party has established the right to a judgment with such clarity as to leave no room for controversy. *Vacca v. Viacom Broadcasting of Missouri, Inc.*, 875 F.2d 1337, 1339 (8th Cir. 1989). The evidence is viewed in the light most favorable to the non-moving party and the non-moving party enjoys the benefit of all reasonable inferences to be drawn from the facts. *Id.* at 1339. The mere existence of *some* alleged factual dispute, however, will not defeat an otherwise properly supported motion for summary judgment if there is no *genuine* issue of *material* fact. *Id.* If the moving party meets its initial burden of production with credible evidence which convincingly shows there is no genuine issue of material facts, the opposing party must come forward with specific facts that demonstrate a genuine issue for trial. *Elbe v. Yankton Independent School District No. 1*, 714 F.2d 848, 850 (8th Cir. 1983). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The only factual dispute is whether Gisela Fredericks resides on the reservation. The tribe filed a motion to strike any exhibits relating to the residency status of Fredericks, and urge the court adopt the lower court's findings that Fredericks resides on the reservation. The issue of residency was not raised before the tribal or appellate court. A-1 raises the issue of residency for the first time in this court.

The fact that Fredericks may or may not reside on the reservation is irrelevant to the issue of whether the tribe retains jurisdiction over a dispute between two non-Indians. If the court determines that the Tribal Court has jurisdiction over A-1 pursuant to the tribal code, the Tribal Court would necessarily have jurisdiction over Fredericks under a similar analysis. Although both the Tribal Court and the appellate court assumed Fredericks was a resident, it is not relevant in the analysis of whether or not the tribe retains jurisdiction.

Moreover, the tribe's core argument is that tribal jurisdiction is premised upon a geographic territory. The plaintiffs' principal argument is that tribal jurisdiction is only present if at least one of the parties is a member of the tribe. Neither theory depends on the residency of Gisela Fredericks at the time of the accident. Therefore, there is no material factual dispute and the court finds summary judgment to be appropriate disposition of this matter.

In regard to tribal civil jurisdiction over non-Indians, the United States Supreme Court has stated:

> Tribal authority over the activities of non-Indians on reservation lands is an important

> part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the Tribal Courts unless affirmatively limited by a specific treaty provision or federal statute.

Iowa Mut. Ins. Co. v. Laplante, 480 U.S. 9, 18 (1987) (citations omitted).

Tribal courts do not have inherent criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). In *Oliphant*, the Supreme Court found that congressional action granting jurisdiction to the federal courts to try non-Indians for offenses committed in Indian Country implicitly preempted tribal jurisdiction. *Id.* at 204. However, the civil jurisdiction of Tribal Court has not been similarly restricted, and the development of the principles governing civil jurisdiction have been different than those governing criminal jurisdiction. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985)(Supreme Court refused to extend *Oliphant* to case involving tribal civil jurisdiction).

In a recent decision regarding tribal criminal jurisdiction, the Supreme Court recognized that Tribal Courts retain civil jurisdiction over disputes involving non-Indians. The court stated that the civil jurisdiction of the tribe over non-Indians typically arises in cases of property ownership within the reservation or "consensual relationships with the tribe or its members through commercial dealing, contracts or other arrangements." *Duro v. Reina*, ___ U.S. ___, 110 S.Ct. 2053, 2061 (1990) (citing *Montana*).

In *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court found that there were two circumstances

in which a tribe may retain civil jurisdiction over non-members. *Id.* at 565-66. First, a tribe may regulate, through taxation and licensing, activities of non-Indians who enter consensual relationships with the tribe and its members. Secondly, the tribe may also "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*

The Tribal Court determined that a tort committed on the reservation, in the course of a performance of a contract with the tribe, has a direct effect on the welfare of the tribe and thus the second exception to *Montana* was satisfied in this case. The appellate court affirmed, concluding that absent a congressional directive it could find no compelling reason not to give the tribe jurisdiction.

Although the Supreme Court has not reached the issue of tribal civil jurisdiction over two non-Indians, a recent ninth circuit case does indirectly address the matter. *Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992). In *Stock West*, an Oregon corporation brought an action in federal district court against a tribal attorney who was also a non-Indian, alleging the attorney committed malpractice in drafting an opinion letter.

The district court dismissed the case, finding that the subject matter of the letter involved tribal concerns and that the corporation should first exhaust tribal remedies. The ninth circuit, *en banc*, affirmed, determining the fact that the corporation was non-Indian did not preclude tribal civil jurisdiction. *Id.* at 918. The court concluded

that the best argument against tribal jurisdiction was that the opinion letter was delivered off the reservation. *Id.*

A-1 contends that *Montana* is controlling in this case and precludes Tribal Court jurisdiction over the personal injury action. A-1 argues that this case does not fall within the two exceptions announced in *Montana*. A-1 argues that there are no consensual relationships present in this case and asserts that the alleged tort between non-Indians does not have a direct effect on the health or welfare of the tribe.

The tribal defendants disagree, arguing that *Montana* only applies in cases of non-Indian fee lands, and this dispute involves an accident which occurred on the reservation. The tribe argues that assuming *Montana* applies, it does allow for jurisdiction in a case of a tort committed on the reservation because of the serious nature of the tort. The tribe argues that because A-1 is performing under a contract with the reservation, it is necessarily subject to tribal jurisdiction for torts committed in the course of performance of that contract on the reservation. Thus, the tribe contends that both prongs of the *Montana* test are satisfied. The tribe notes that A-1 agreed in its contract with the tribal-owned corporation to be bound by the tribal building codes, employment rights codes and "the laws regulations and directives of applicable governing authorities."

A-1 also argues that the burden is on the Fredericks to cite to a treaty or statute which expressly gives the Three Affiliated tribes authority to conduct civil lawsuits

against non-Indians in Tribal Court. The defendants disagree, stating that jurisdiction is presumed unless otherwise limited by treaty or statute.

The applicable tribal code provisions are as follows:

Chapter 1, Section 3: Jurisdiction of the Courts

Subsection 3.2 – Jurisdiction – Territorial

> The jurisdiction of the court shall extend to any and all lands and territory within the Reservation boundaries, including all easements, fee patented lands, rights of way; and over land outside the Reservation boundaries held in trust for Tribal members or the Tribe.

Subsection 3.3 – Jurisdiction – Personal

> Subject to any limitations or restrictions imposed by the constitution or the laws of the United States, the Court shall have civil and criminal jurisdiction over all persons who reside, enter, or transact business within the territorial boundaries of the reservation; provided that criminal jurisdiction over non-Indians shall extend as permitted by case law.

Subsection 3.5 – Jurisdiction – Subject Matter

> The Court shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Reservation, and over all criminal offenses which are enumerated in this Code, and which are committed within the exterior boundaries of the Reservation.

Chapter 2. Section 3(f): Long Arm Statute. Any person subject to the jurisdiction of the Tribal Court during any of the following acts:

1) The transaction of any business of the Reservation;

2) The commission of any act which results in accrual of a tort action within the Reservation;

3) The ownership, use or possession of any property, or any interest therein, situated within the Reservation.

The court finds that the Tribal Court was correct when it found that it had jurisdiction over this dispute. The tribal code clearly provides for personal jurisdiction over Fredericks, Stockert and A-1 Contractors. The tribe has jurisdiction over Fredericks because she elected to bring her action in Tribal Court. She exercised a discretionary choice of forum. The tribe has jurisdiction over Stockert because he entered the reservation, and he committed an act which resulted in the accrual of a tort action within the reservation. The tribe has jurisdiction over A-1 Contractors because it entered the Reservation and transacted business on the Reservation.

The tribal code also provides for subject matter jurisdiction over the tort action. Section 3.5 of the code states that "the Court shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Reservation . . . " The tort action arose within the exterior boundaries of the Reservation and therefore the Tribal Court has subject matter jurisdiction.

The law is clear that Tribal Courts have civil jurisdiction over non-Indians unless specifically limited by treaty or federal statute. *See Iowa Mut. Ins. Co. v. Laplante*, 480 U.S. 9 (1987). That jurisdiction is not exclusive. Here it is

invoked by plaintiffs' choice of forum. There has been no such limitation over civil causes of action arising on the reservation between two non-Indians, and therefore, the court **HEREBY DENIES** the plaintiffs' request for relief.

Based on the foregoing, it is the **ORDER** of the court:

1. The Fredericks' motion for summary judgment is **GRANTED.** (doc. #13).

2. The plaintiffs' motion for summary judgment is **DENIED.** (doc. #19).

3. The tribal defendants' cross-motion for summary judgment is **GRANTED.** (doc. #29).

4. The tribal defendants' motion to strike the exhibits is **GRANTED.** (doc. #31).

5. The motions for oral argument are **DENIED.** (doc. # 33, 49)

6. The plaintiffs motion to amend pleadings is **DENIED.** (doc. #43)

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 16th day of September 1992.

/s/ Patrick A Conmy
Patrick A. Conmy, Chief Judge
United States District Court

Civil No. A1-92-24

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 16 day of Sept. 1992.

EDWARD J. KLECKER, CLERK

By: /s/ Deborah Thomason
Deputy

UNITED STATES DISTRICT COURT

SOUTHWESTERN DISTRICT OF NORTH DAKOTA
DIVISION

A-1 Contractors, and Lyle Stockert,

v.

Honorable William D. Strate, Associate Tribal Judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthhold Indian Reservation, et al.,

JUDGMENT IN A CIVIL CASE

CASE NUMBER: A1-92-24

(Filed Sep. 16, 1992)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED **That pursuant to the Memorandum and Order entered this date that Fredericks' motion for summary judgment is** GRANTED. **The plaintiffs' motion for summary judgment and to amend pleadings is** DENIED. **The tribal defendants' cross-motion for summary judgment is** GRANTED **and the motion to strike the exhibits is** GRANTED. **The motions for oral argument are** DENIED. **The above entitled action is dismissed with prejudice.**

September 16, 1992
Date

EDWARD J. KLECKER
Clerk

/s/ Deborah Thomason
(By) Deputy Clerk

IN THE
NORTHERN PLAINS INTERTRIBAL
COURT OF APPEALS

Lyndon Benedict Fredericks, Kenneth Lee Fredericks, Paul Jonas Fredericks, Hans Christian Fredericks, Jeb Pius Fredericks, Kenneth Lee Fredericks on behalf of Gisela Fredericks; and Gisela Fredericks,	)	No. CV-06-06-91
Plaintiffs-Appellees,	)	OPINION
vs	)	
Continental Western Insurance Company, A-1 Contractors, Lyle Stockert,	)	(Dated January 8, 1992)
Defendants-Appellants.	)	

Appeal From Tribal Court
For The Three Affiliated Tribes
Of The Fort Berthold Indian Reservation

Patrick J. Ward
Michael G. Fiergola
ZUGER, KIRMIS,
BOLINSKE & SMITH
Attorneys for Appellants
A-1 Contractors &
Lyle Stockert
P.O. Box 1695
Bismarck, ND 58502-1695

Ronald A. Reichert
Attorneys for Appellees
Drawer K
Dickinson, ND 58602-8305

Mitchell Mahoney
PRINGLE &
HERIGSTAD, P.C.
Attorneys for Appellant
Continental Western
Insurance Company
P.O. Box 1000
Minot, ND 58702-1000

Argued by: Michael G.
Fiergola and Mitchell
Mahoney

Thomas A. Dickson
NODLAND & DICKSON
Attorneys for Appellees
P.O. Box 640
Bismarck, ND 58502-0640

Argued by: Ronald A.
Reichert

Statement of the Case

This personal injury lawsuit was commenced in the Fort Berthold Tribal Court as a result of an automobile accident which occurred on the Fort Berthold Indian Reservation, North Dakota on November 9, 1990.

The fundamental issue before this Court is whether the Tribal Court has subject matter jurisdiction and personal jurisdiction over the parties involved in this action. The parties involved in the accident are non-Indian.

It is the view of this Court that the Fort Berthold Tribal Court has subject matter jurisdiction and personal jurisdiction over the parties involved in this action, accordingly the trial court's decision is affirmed.

The appellees Motion to Dismiss the appeal is denied as the appeal was timely and the issue of jurisdiction is appealable.

The other issues concerning loss of consortium by adult children and the naming of the insurance company in a tort action are remanded back to the Trial Court for its consideration.

Facts

On November 9, 1990, Gisela Fredericks driving a Honda Civic collided with a gravel truck driven by Lyle Stockert on North Dakota Highway No. 8 north of Twin Buttes, North Dakota. The collision occurred within the exterior boundaries of the Fort Berthold Indian Reservation.

Gisela Fredericks has been a resident of the Fort Berthold Indian Reservation for over 40 years. Mrs. Fredericks is not a member of Three Affiliated Tribes. Her now deceased husband, Kenneth Fredericks Sr. was a life long farmer-rancher on the Fort Berthold Reservation and a member of Three Affiliated Tribes. Mrs. Frederick's five sons and plaintiffs in this action are members of the tribe. Mrs. Fredericks owns real and personal property on the Fort Berthold Indian Reservation.

The gravel truck that was involved in the collision was owned by A-1 Contractors and driven by Lyle Stockert. The truck was insured by Continental Western Insurance Company. At the time of the accident A-1 contractors was hauling gravel on the reservation under a sub-contract agreement with LCM Corporation. LCM Corporation is owned by Three Affiliated Tribes Tribal Government.

Analysis of Law and Fact

To give proper perspective in analyzing the issue of whether the Fort Berthold Tribal Court has jurisdiction over non-Indians involved in a traffic accident on the reservation it is appropriate to give a brief overview of

federal case law regarding civil and criminal jurisdiction of tribal courts.

In *Oliphant v Suquamish Indian Tribes,* 435 U.S. 191 (1978) the Supreme Court held that tribes cannot exercise criminal jurisdiction over non-Indians. The Court reasoned that the exercise of such jurisdiction would be inconsistent with the status of tribes as domestic dependent nations. In *Duro v Reina* 110 S. Ct. 2053 (1990) the Supreme Court has ruled that tribal courts do not have criminal jurisdiction over non-member Indians; also see *Greywater v Joshua* 846 F 2d 486 (8th Circuit 1988). Since *Duro,* Congress and the President have passed a law giving tribal courts criminal jurisdiction over non-member Indians, whether such law passes constitutional muster is questionable; see *Duro* and *Reid v Covert* 354 U.S. 1 (1957).

In civil actions tribes have sovereign immunity. *Three Affiliated Tribes v Wold Eng'g* 476 U.S. 877 (1986), *Wichita Affiliated Tribes of Oklahoma v Hodel* 788 F 2d 765 (D.C. Circuit 1986).

Regarding personal jurisdiction, state courts do not have jurisdiction over an action arising in Indian Country filed by a non-Indian against an Indian, because state court jurisdiction would interfere with the rights of reservation Indians to make their own laws and be ruled by them *Williams v Lee* 358 U.S. 217 (1959). State courts do not have jurisdiction to hear claims arising in Indian Country when both parties are Indian and civil jurisdiction hasn't been transferred to the state by public law 280 67 Stat. sub. 588 codified as amended 18 U.S.C. sub. 1162 *Fisher v District Court* 424 U.S. 382 (1976). Absent Federal

statutory authority, *Williams* has deprived state courts of civil jurisdiction over Indians in Indian Country. State courts do have civil jurisdiction over actions where an Indian files against a non-Indian even when the cause of action arises in Indian Country *Three Affiliated Tribes v Wold* 476 U.S. 877 (1986). State courts have jurisdiction over suits by non-Indians against non-Indians even when the claim arises in Indian Country, but only if Indian interests are not affected *Williams v Lee* 358 U.S. 217 (1959).

In the area of regulation, tribal governments are limited in their authority over the activities of non-Indians on fee title land on reservations but not totally divested of such authority; *Montana v United States* 450 U.S. 544, *Brendale v Confederated Tribes & Bands* 109 S. Ct. 2994 (1989). "Survey of Civil Jurisdiction in Indian Country 1990" 2 *American Indian Law Review* Fall 1991 gives an excellent overview of Indian civil jurisdiction.

"In general terms jurisdiction is the power to hear and determine a cause of action." *Schillerstrom v Schillerstrom* 32 NW 2d 106, 122 (1948). The concept of jurisdiction is divided into two types: jurisdiction over the subject matter and jurisdiction over the parties. See generally 20 Am. Jur. 2d courts subsection 105 (1965). To properly act in a case, a court must be vested with both jurisdictions *Reliable Inc. v Stutsman County Commission* 409 NW2d 632, 634 (N.D. 1987). "A court has subject matter jurisdiction if it has authority under the constitution and laws, to hear and determine cases of a general class to which a particular action belongs."

The appellants in this action, Continental Western Insurance, A-1 Contractors and Lyle Stockert contend that the Tribal Court does not have jurisdiction over the parties because Gisela Fredericks and Lyle Stockert are non-Indian. Further extending their legal theory, A-1 is not an Indian nor Tribal Corporation.

Supporting their proposition that the Tribal Court does not have jurisdiction over this tort action the parties cite *Montana v United States* 450 U.S. 544. They also cite *Brendale v Confederated Tribes & Bands* 492 U.S. 408. *Montana* states that tribes do not have the authority to regulate hunting and fishing by non-Indians on non-Indian lands. Through their original incorporation into the United States as well as through specific treaties and statutes Indian tribes have lost many of the attributes of sovereignty particularly as it relates to the relations between the tribe and non-members of the tribe. In *Brendale* tribes are limited in zoning fee title lands within a reservation. However, under certain circumstances tribes may place zoning restrictions on fee title property of non-Indians.

It is the opinion of this Court that *Montana* and *Brendale* are not dispositive of the issue before this Court. The regulation of non-Indians and their property with civil, quasi-criminal or criminal penalties is quite different than non-Indians seeking damages in a tort action in Tribal Court. The analysis of determining criminal jurisdiction over non-Indians is not controlling nor the same as the analysis of determining civil jurisdiction *National Farmers Union* 85 L.Ed.2d at 826 footnote 16 & 17.

It is the opinion of this Court that *Williams v Lee* 358 U.S. 217 (1959) along with *Iowa Mutual Insurance Co. v La Plante* 480 U.S. 9 (1987) are controlling in resolving the issue before this Court. In *Williams* the Supreme Court recognized the authority of the Tribal Court to hear disputes between an Indian plaintiff and a non-Indian defendant. The Court stated in *Williams:* "there can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that the defendant is not an Indian. He was on the reservation and the transaction with an Indian took place there." Affirming the reasoning in *Williams* over 25 years later *La Plante* stated that tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty and civil jurisdiction over such activities presumptively lies in tribal courts unless affirmatively limited by specific treaty provision or federal statute *Iowa Mutual Insurance Co. v LaPlante* 94 L.Ed. 2d 10 at 21.

Although Gisela Fredericks is not a citizen of Three Affiliated Tribes she has been a member of the Fort Berthold community and a resident for many years. Like any sovereign, Three Affiliated Tribes has an interest in providing a forum for peacefully resolving disputes that arise in their geographic jurisdiction and protecting the rights of those who are injured within such jurisdiction. Absent Congressional directive this Court can find no compelling reason not to give the Fort Berthold Tribal Court jurisdiction.

Amalgamating Federal case law with regard to tribal civil jurisdiction it is the view of this Court that there is a two pronged inquiry in determining whether a tribal court has jurisdiction. The first prong of inquiry is whether a tribal court is authorized by the governing authority to take jurisdiction. The second prong of inquiry is whether a tribal court is limited in taking jurisdiction by either treaty provision or federal law.

In analyzing the first prong of the inquiry it is necessary to determine what authority was conveyed by Three Affiliated Tribes Tribal Council to Tribal Court. Relevant sections of the Tribal Code are listed.

Chapter 1, Section 3: Jurisdiction of the Courts

Sub-Section 3.1 – Policy

It is the intent of this Code that the jurisdictional powers be *liberally construed* to serve the ends of justice, and a failure to legislate in a particular area shall not be deemed a waiver of that authority.

Sub-Section 3.2 – Jurisdiction-Territorial

The jurisdiction of the Court shall extend to any and all lands and territory within the Reservation boundaries, including all easements, fee patented lands, rights of way; and overland outside the Reservation boundaries held in trust for Tribal members or the Tribe.

Sub-Section 3.3 – Jurisdiction-Personal

Subject to any limitations or restrictions imposed by the Constitution or the laws of the United States, the court shall have civil and criminal jurisdiction over all persons who *reside,*

enter, or transact business within the territorial boundaries of the Reservation; provided that criminal jurisdiction over non-Indians shall extend as permitted by case law.

Sub-Section 3.5 – Jurisdiction-Subject Matter

The Court shall have jurisdiction over all civil causes of action *arising within the exterior boundaries of the Reservation,* and over all criminal offenses which are numerated in this Code, and which are committed within the exterior boundaries of the Reservation.

Chapter 2, Section 3 (f): Long Arm Stature [sic].

Any person subject to the jurisdiction of the Tribal Court during any of the following acts:

(1) The transaction of any business of the Reservation;

(2) The commission of any act which results in accrual of a tort action within the Reservation;

(3) The ownership, use or possession of any property, or any interest therein, situated within the Reservation, (emphasis added)

It is clear that the Tribal Council gave Tribal Court broad authority to hear civil disputes and did not limit the Court to particular types of actions or persons. There is no limitation in the code excluding non-Indians from seeking relief in a tort action against another non-Indian.

Unlike *Montana* and *Brendale* where an individuals rights and or privileges were being diminished by the tribal governing authority, here they are being expanded. In this case the tribal governing body has extended the

civil justice system to all who are on the Fort Berthold Reservation so that they have the right to seek redress in a court of law when they are not satisfied by offers of settlement or when a party denies liability.

In the second prong of the analysis this Court can find no treaty restrictions or federal statutes prohibiting the tribal court from taking jurisdiction over this case. The tribal court may be limited by the Indian Civil Rights Act, 25 U.S.C. sub.1302; on how it may proceed but it does not create a prohibition on the tribal court in taking jurisdiction; nor has the State of North Dakota taken jurisdiction of this case through Public Law 280; 25 U.S.C. sub. 1321.

It is noted that the parties in this action are all represented by licensed attorneys and the trial judge in this case is a licensed practicing attorney and although the State of North Dakota may have jurisdiction in this matter it is not exclusive. The State is probably prohibited from taking jurisdiction of this matter while this action is pending in Tribal Court *National Farmers Union Insurance Co. v Crow Tribe* 471 U.S. 845.

The Tribal Court is subject to the limitation of minimum contacts in taking jurisdiction *World-Wide Volksvaken Corp. v Woodson* 444 U.S. 286 (1980) *International Shoe Co. v Washington* 326 U.S. 310 (1945). Minimum contacts is not a concern since the automobile accident took place within the boundaries of the reservation. The plaintiff is a resident of the reservation and the defendant Stockert was doing business on the reservation and Continental is Stockert's insurance carrier. The fact that the auto/truck collision occurred on a state highway does not

in and of itself divest the tribal court of jurisdiction *National Farmers Union Co. v Crow Tribe* at 847.

For the reasons set out in this Opinion the decision of the Trial Court is affirmed. The Fort Berthold Tribal Court has jurisdiction over the parties and subject matter in this case.

Other Issues

This Court expresses no opinion as to whether the plaintiffs have a claim for loss of consortium; nor does this Court express an Opinion as to whether Continental Western Insurance should be a named defendant in this tort action. These issues have not been addressed by the Trial Court and it is untimely for this Court to render an Opinion on these issues. Those issues are remanded back to the Trial Court for its consideration.

The Appellees Motion to Dismiss Appeal

The Appellees Motion to Dismiss the Appeal is denied. It is the Opinion of this Court that the issue of jurisdiction is appealable. The Memorandum Opinion of the Trial Court was an Order. Based on the filing date the appellants complied with Appellate Rule 20.

The Trial Court's jurisdiction determination is affirmed. This matter is remanded back to the Trial Court for further proceedings.

Dated this 8th day of January, 1992.

OPINION BY:

1-13-92 /s/ Donovan Foughty
Donovan Foughty
Appellate Judge

/s/ Paul Godtland
Paul Godtland
Chief Appellate Judge

/s/ Robert GreyEagle
Robert GreyEagle
Appellate Judge

IN THE
NORTHERN PLAINS INTERTRIBAL
COURT OF APPEALS

Lyndon Benedict Fredericks, Kenneth Lee Fredericks, Paul Jonas Fredericks, Hans Christian Fredericks, Jeb Pius Fredericks, Kenneth Lee Fredericks on behalf of Gisela Fredericks; and Gisela Fredericks,	**AFFIDAVIT OF SERVICE BY MAIL**
Plaintiffs-Appellees,	CASE NUMBER: CV-06-06-91
vs.	
Continental Western Insurance Company, A-1 Contractors, Lyle Stockert,	
Defendants-Appellants.	

STATE OF SOUTH DAKOTA)
) SS.
County of Brown)

I, James Bluestone, Jr., COURT ADMINISTRATOR/ APPELLATE COURT CLERK FOR THE NORTHERN PLAINS INTERTRIBAL COURT OF APPEALS, DEPOSES AND SAYS:

THAT he is of legal age, a citizen of the United States, and is not a party to, nor has he have an interest in the above entitled action; that on 23 day of January, 1992, he deposited in the United States Post Office, in the City of Aberdeen, South Dakota, a CERTIFIED COPY of the following document(s):

1. OPINION of Above mentioned case.

2.

3.

THAT said envelopes was (were) addressed as follows:

Patrick Ward
Michael Fiergola
P.O. Box 1695
Bismarck, ND 58502-1695

Mitchell Mahoney, P.O. Box 1000 Minot, ND 58702-100
Ronald Reichert, Drawer K, Dickinson, ND 58602-8305
Thomas Dickson, P.O. Box 640, Bismarck, ND 58502-0640

✓Urban Bear Don't Walk
Legal Department, TAT
P.O. Box 220 – New Town, ND 58763

Clerk of Courts
Three Affiliated Tribes/Tribal Court
P.O. Box 428 – Mendaree, ND 58757

THAT the the above document(s) was (were) duly mailed in accordance with the provisions of the NORTHERN PLAINS INTERTRIBAL COURT OF APPEALS RULES of Appellate Procedure.

I HEREBY SIGN MY NAME AND AFFIX THE SEAL OF THE NORTHERN PLAINS INTERTRIBAL COURT OF APPEALS:

DATED this 23 day of January, 1992

(Seal)

/s/ Edith Likes Eagle
COURT ADMINISTRATOR/
APPELLATE COURT CLERK

IN TRIBAL COURT FORT BERTHOLD RESERVATION
THREE AFFILIATED TRIBES MANDAREE, NORTH DAKOTA

Lyndon Benedict Fredericks, Kenneth Lee Fredericks, Paul Jonas Fredericks, Hans Christian Fredericks, Jeb Pius Fredericks, Kenneth Lee Fredericks on behalf of Gisela Fredericks; and Gisela Fredericks, Plaintiff, vs. Continental Western Insurance Company, A-1 Contractors, Lyle Stockert, Defendant.	**MEMORANDUM OPINION** **CIVIL NO: 5-91-A04-150** **(Filed Sep. 4, 1991)**

This matter having come before the Court upon Defendants', A-1 Contractors and Lyle Stockert, Motion to Dismiss based upon a lack of personal and subject matter jurisdiction. The Motion to Dismiss was initially brought by the Defendant Lyle Stockert and was joined in by A-1 Contractors. The Defendant Continental Western Insurance Company has also joined in the Motion to Dismiss.

The Defendants filed a Memorandum in Support of Motion to Dismiss dated June 14, 1991. The Motion to Dismiss was resisted by the Plaintiffs with their filing of a

Brief in Opposition to the Motion to Dismiss dated July 22, 1991. The Defendants then filed a Reply Memorandum in Support of Motion to Dismiss dated August 1, 1991.

The Court, having considered the parties arguments on the Motion to Dismiss and being fully advised in the premises, now issues the following Memorandum Opinion:

Initially, the Court is faced with a somewhat bare record of the facts of this case. None of the parties have submitted affidavits in support of or opposition to the pending Motion. Accordingly, the Court must rely upon the Briefs and Memorandums filed by the parties as well as the pleadings on file with the Court to discern the factual background of this case. From such a review, the Court finds that the following facts are undisputed by the parties for the purpose of this motion:

1. On November 9, 1990, an automobile accident occurred North of Twin Buttes, North Dakota, within the boundaries of the Fort Berthold Reservation, involving vehicles driven by the Plaintiff Gisela Fredericks and the Defendant Lyle Stockert.

2. That neither Lyle Stockert nor Gisela Fredericks are enrolled members of the Three Affiliated Tribes.

3. That the remaining Plaintiffs are the adult children of Gisela Fredericks and are apparently enrolled members of the Three Affiliated Tribes.

4. That at the time the automobile accident occurred, Gisela Fredericks was a resident of the Fort Berthold Reservation and Lyle Stocker was employed by and/or the owner or operator of A-1 Contractors which

at that time was performing work under a sub-contract on a construction project within the boundaries of the Fort Berthold Reservation. The Court assumes, for the purpose of this motion, that the Defendant Continental Western Insurance Company apparently provided coverage for the Defendants' activities within the Reservation boundaries.

As this case is currently postured, the Plaintiff Gisela Fredericks, a nonmember of the Three Affiliated Tribes, has consented to the jurisdiction of the Tribal Court by filing this action in the Tribal Court and seeking to prosecute her claims within the Tribal Court system. However, the Defendants have all filed special appearances resisting the jurisdiction of this Court.

In considering the present Motion, the Court is guided by the following provisions of the Tribal Code:

CHAPTER 1, SECTION 3: JURISDICTION OF THE COURTS

SUB-SECTION 3.1 – POLICY

It is the intent of this Code that the jurisdictional powers be *liberally construed* to serve the ends of justice, and a failure to legislate in a particular area shall not be deemed a waiver of that authority.

SUB-SECTION 3.2 – JURISDICTION-TERRITORIAL

The jurisdiction of the Court shall extend to any and all lands and territory within the Reservation boundaries, including all easements, fee

patented lands, rights of way; and over land outside the Reservation boundaries held in trust for Tribal members or the Tribe.

SUB-SECTION 3.3 – JURISDICTION-PERSONAL

Subject to any limitations or restrictions imposed by the Constitution or the laws of the United Sates, the Court shall have civil and criminal jurisdiction over all persons who *reside, enter,* or *transact business within the territorial boundaries of the Reservation;* provided that criminal jurisdiction over non-Indians shall extend as permitted by case law. (Definition omitted)

SUB-SECTION 3.5 – JURISDICTION-SUBJECT MATTER

The Court shall have jurisdiction over all civil causes of action *arising within the exterior boundaries of the Reservation,* and over all criminal offense which are numerated in this Code, and which are committed within the exterior boundaries of the Reservation.

CHAPTER 2, SECTION 3 (f): LONG ARM STATUTE. Any person subject to the jurisdiction of the Tribal Court during any of the following acts:

(1) The transaction of any business of the Reservation;

(2) The commission of any act which results in accrual of a tort action within the Reservation;

(3) The ownership, use or possession of any property, or any interest therein, situated within the Reservation.

(emphasis added)

Applying these code sections to the undisputed facts of this case, it is clear that the Court has jurisdiction over the Plaintiff Gisela Fredericks. As a resident of the Fort Berthold Reservation, she is entitled to avail herself of the Tribal Court system to prosecute any claims which may arise within the Reservation boundaries. The claims of the remaining Plaintiffs, as enrolled members, are also within the jurisdiction of the Tribal Court.

Similarly, it is clear that the Defendants are also subject to the jurisdiction of this Court. The Defendants have entered upon and transacted business within the territorial boundaries of the Reservation. As such, they have entered into consensual relationships with the Tribe and its members. The automobile accident occurred within the Reservation boundaries while the Defendant was engaged in the conduct of business on the Reservation.

The Defendants cite the case of *Montana vs. United States,* 450 U.S. 544, 101 S.Ct. 1245 (1981) as authority for the dismissal of this action. However, that case is distinguishable from the present case as it involved what was essentially criminal sanctions imposed upon nonmembers for violation of Tribal hunting and fishing codes. In addition, the facts in *Montana* dealt with activity on State-owned land within the Reservation, a fact situation not present in the instant case.

The Court in *Montana* specifically recognized that Indian Tribes retain civil authority over the conduct of non-Indians within the Reservation. The commission of a tort, as alleged in the Complaint, certainly is an act which has a direct effect on the economic security, health and

welfare of the Tribes and its members. See *Montana* at 450 U.S. 565, 566. Further, as the tort alleged in the Complaint arises out of the Defendant's consensual business activity within the Reservation. The Court's ruling in *Montana* does not bar the exercise of jurisdiction by the Tribal Court over the claims presented by the Plaintiffs. In fact, the claim presented by the Plaintiffs appear to be precisely the type of civil actions the *Montana* Court recognizes as being subject to Tribal jurisdiction.

In any event, since the entry of the *Montana* decision, the Supreme Court has continued to recognize and affirm the exercise of civil jurisdiction by Tribal Courts over the activity of non-Indians on Reservation land as an important aspect of Tribal sovereignty and it has held that such jurisdiction over these consensual activities directly affecting the welfare of the Tribes, its members and Reservation residents presumptively lie with the Tribal Courts unless affirmatively limited by specific treaty provisions or federal statutes. See, generally, *Dura vs. Reina*, 110 S.Ct. 2053 (1990); *Iowa Mutual Insurance Company vs. LaPlante*, 480 U.S. 9, 107 S.Ct. 971 (1987); *Nat. Farmers Union Ins. Co. vs. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447 (1985).

Accordingly, the Court finds that the Tribal Court has jurisdiction over the Plaintiff Gisela Fredericks based upon her status as a resident of the Reservation and over the Defendants due to their voluntary and consensual acts of entering upon and transacting business within the boundaries of the Fort Berthold Reservation. The Court finds that these activities are not "de minimus" and the assertion of Tribal Court jurisdiction does not offend traditional concepts of due process so as to render the

exercise of jurisdiction by this Court violative of the due process provisions of the United States Constitution. The Defendants have failed to identify any federal laws, treaty provisions or provisions of the United States Constitution which would preclude the exercise of jurisdiction by the Tribal Court over the claims presented by the Plaintiffs.

As the Court determines that it has jurisdiction over the non-Tribal member parties, specifically, Plaintiff Gisela Fredericks and Defendants Lyle Stockert, A-1 Contractors, and Continental Western Insurance Company, the Court does not address nor express any opinion concerning the consortium claims brought by the adult children of the Plaintiff Gisela Fredericks. The status of Gisela Fredericks as a resident of the Fort Berthold Reservation and the consensual relationships established by the Defendants by entering upon and transacting business within the Reservation boundaries together with the alleged tort occurring within the Reservation are sufficient to establish the jurisdiction of this Court.

Accordingly, the Motion to Dismiss is DENIED.

Dated this 4th day of September, 1991.

BY THE COURT:

/s/ William L. Strate
Associate Tribal Judge

(1.24e)

IN TRIBAL COURT FORT BERTHOLD RESERVATION

THREE AFFILIATED TRIBES MANDAREE, NORTH DAKOTA

Lyndon Benedict Fredericks, Kenneth Lee Fredericks, Paul Jonas Fredericks, Hans Christian Fredericks, Jeb Pius Fredericks, Kenneth Lee Fredericks on behalf of Gesela Fredericks; and Gisela Fredericks,	)	CIVIL No. 5-91-A04-150
Plaintiffs	)	
vs.	)	
Continental Western Insurance Company, A-1 Contractors, Lyle Stockert,	)	
Defendants.	)	

AFFIDAVIT OF SERVICES BY MAIL

STATE OF NORTH DAKOTA)
COUNTY OF MCKENZIE)

FayAnn Moberg, being first duly sworn, deposes and says that on the 5th day of September, 1991, she served the attached Memorandum Opinion up Mitchell Mahoney, Pat Ward and Thomas Dickson, by placing a true and correct copy thereof in envelopes addressed as follows:

Mitchell Mahoney
PRINGLE & HERISTAD, P.C.
PO Box 1000
Minot, ND 58702

Pat Ward
ZUGER, KIRMIS, BOLINSKY
& SMITH
PO Box 1695
Bismarck, ND 58502

Thomas Dickson
NODLAND, THARALDSON
& DICKSON
PO Box 640
Bismarck, ND 58502

and depositing the same, with postage prepaid, in the United States Post Office at Mandaree, North Dakota.

/s/ FayAnn Moberg
FayAnn Moberg,
Clerk of Court

Subscribed and sworn to before me this 5th day of September, 1991.

(SEAL)

/s/ Curtis M. Young Bear, Jr.
Notary Public
My Commission Expires:
CURTIS M. YOUNG BEAR, JR.
STATE OF NORTH DAKOTA
Expires May 20, 1994